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# "Enemy of the People": Negotiating News at the White House

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# **“Enemy of the People”: Negotiating News at the White House**

CAROL PAULI\*

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**I. INTRODUCTION**

In a crowded room at the White House, an urgent negotiation is taking place between two parties who will never reach agreement. On one side are the president and his staff; on the other, the White House press corps. Government and press are meant to stay in eternal tension, so there is no hope of a lasting resolution. Instead, what these two sides keep negotiating is a joint product: together they are making news.

White House press briefings gained new attention with the arrival of President Donald J. Trump, a reputed bargaining expert who once wrote, "Deals are my art form."<sup>1</sup> His administration broke press traditions, abandoned conventions of civility, and violated societal norms about acknowledging mistakes. The moves were so overt and unusual as to bring into sharp relief such classic negotiation concerns as style, strategy, tactics, and the best alternative to a negotiated agreement (BATNA).

This article considers seven encounters between the White House and the press from the election of President Trump through the first weeks of his administration. It analyzes them as opening moves in a negotiation over news content and over the rules of president-press engagement. It views both parties as political institutions, each operating within its own system of rewards and punishments. The article draws on literature in negotiation, political science, and journalism. It incorporates transcripts of White House press briefings, news stories, editorials, and published discussions among journalists.

Part II of this article examines the White House press briefing as one exchange in an ongoing series of negotiations. This section sketches the traditional role of the press in communicating and reshaping a politician's messages to the public. It sets out the rules, case law, and customs that have shaped the conduct of White House press briefings in the past. It draws on an analysis of press briefings as iterative games of ultimatum, in which shifts in values can strengthen or weaken the positions of the parties. This section examines the traditional bargaining positions of the White House and the press, and it introduces the issues of identity and history that color the exchange. Finally, it outlines a zone of possible agreement between a president and the press.

Part III examines the bargaining positions of the press and president-elect after the 2016 election. It notes the decrease in the bargaining power of the traditional press that has accompanied the upending of its business model, the growth of an insular right-wing media system, and the penchant of the president to communicate spontaneously and directly with the public through

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<sup>1</sup> DONALD J. TRUMP WITH TONY SCHWARTZ, *THE ART OF THE DEAL* 1 (2015).

the social media site called Twitter. This section reviews specific exchanges between the White House and the press viewing these encounters through the lens of negotiation. It finds an array of sometimes conflicting administration moves. Among these were positioning, playing tit-for-tat, attacking, changing the ground rules of the press briefing, and weakening the reporters' BATNA.

Part IV recommends negotiating moves to help White House reporters cover this administration and future ones. It advises the press to articulate expansive goals based on the needs of the public and to highlight the goals that it can accomplish without the cooperation of the White House. It advises the press to consider the interests of this particular president and, using the model of the ultimatum game, to take steps that can shift the balance of power in its own favor. It advises the press to be wary of losing perspective or demonizing the president. Finally, it suggests ways for the press to strengthen its options if it cannot get accurate information or an agreement on workable ground rules from the White House.

Part V concludes. It notes that conflict in the Briefing Room did not ripen for resolution in the months immediately after the election because both the president and the press appeared to benefit from it. It also suggests areas where the field of conflict resolution can contribute further thought and advice.

## II. WHITE HOUSE PRESS BRIEFINGS

### A. *Press Briefing as Negotiation*

Negotiation has a wide range of definitions.<sup>2</sup> Among them, "negotiation is [defined as] an interactive communication process by which two or more parties who lack identical interests attempt to find a way to coordinate their behavior or allocate scarce resources in a way that will make them better off than they could be if they were to act alone."<sup>3</sup> A White House press briefing fits comfortably in these broad parameters. At a press briefing, questions and answers are an interactive communication process. The parties lack identical interests,<sup>4</sup> but they need each other to accomplish their goals:

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<sup>2</sup> Adrian Borbély, Noam Ebner, Chris Honeyman, Sanda Kaufman & Andrea Kupfer Schneider, *A "Grand" Unified Negotiation Theory . . . in Context*, 2017 J. DISP. RESOL. 145, 153–54 (2017).

<sup>3</sup> RUSSELL KOROBKIN, *NEGOTIATION THEORY AND STRATEGY* 1 (2002), *quoted in* Jayne Seminare Docherty & Marcia Caton Campbell, *Consequences of Principal and Agent*, in *THE NEGOTIATOR'S FIELDBOOK: THE DESK REFERENCE FOR THE EXPERIENCED NEGOTIATOR* 497, 498 (Andrea Kupfer Schneider & Christopher Honeyman, eds., 2006).

<sup>4</sup> TIMOTHY COOK, *GOVERNING WITH THE NEWS: THE NEWS MEDIA AS A POLITICAL INSTITUTION* 123 (2005) ("[T]he news media have their own concerns and priorities, which

the White House needs the press to communicate its views to the public, and the press needs the White House to supply information for its stories.<sup>5</sup> In the end, their behavior improves their access to the scarce resource of public attention.

Furthermore, a press briefing meets the four requirements that scholars have proposed as the essence of negotiation<sup>6</sup>: (1) The parties prepare for the session and see it as a negotiation. Although the White House and the press rarely, if ever, use the term “negotiation” to describe their encounters in the Briefing Room,<sup>7</sup> both sides feel the tension of their competing interests as they try to extract what they need from each other.<sup>8</sup> (2) The parties are interdependent.<sup>9</sup> (3) The parties communicate back and forth, and (4) the parties’ behavior changes as a result.<sup>10</sup> They prepare for the session; they are interdependent; they communicate back and forth; and their behavior is influenced as a result. In addition, each side faces the object-subject tension.

Before the late 1800s, presidents talked directly to the public in speeches and writing and did so primarily during election years.<sup>11</sup> Newspapers covered them from the sidelines, serving as politically opinionated observers and critics.<sup>12</sup> Once elected, a president would pursue his agenda by bargaining directly with Congress, out of the public eye.<sup>13</sup> But as the press moved toward professionalism and fact-based reporting, it also moved into a mediating role between politician and the public, asking questions of politicians and relaying the answers to the public.<sup>14</sup> Instead of bargaining directly with Congress,

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are never identical with those of the official sources upon whom they rely to help them make the news.”).

<sup>5</sup> See Brian J. Fogarty, *Modeling the Negotiation of Newsworthiness*, 39 Pol. & Pol’y 1053, 1054 (2011) (“The press needs information sources to gather the pertinent material to develop and create news stories; typically, these sources are elected and government officials. The government and its members need the press to convey their viewpoints, plans, and actions to the citizenry. This informational exchange is never one-sided and is mutually reinforcing.”).

<sup>6</sup> See generally Andrea Kupfer Schneider, Noam Ebner, David Matz & John Lande, *The Definition of Negotiation: A Play in Three Acts*, 2017 J. DISP. RESOL. 15 (2017).

<sup>7</sup> Fogarty, *supra* note 5, at 1056 (“[B]argaining over the news product is typically hidden. To date, we have case studies and examples of the bargaining process, though usually not couched in those terms.”).

<sup>8</sup> See STEVEN CLAYMAN & JOHN HERITAGE, *THE NEWS INTERVIEW* 28–29 (2002).

<sup>9</sup> *Id.*

<sup>10</sup> See generally Schneider, Ebner, Matz & Lande, *supra* note 6.

<sup>11</sup> *Id.* at 26–27.

<sup>12</sup> COOK, *supra* note 4, at 132.

<sup>13</sup> SHANTO IYENGAR, *MEDIA POLITICS: A CITIZEN’S GUIDE* 194–95 (3d ed. 2016).

<sup>14</sup> CLAYMAN & HERITAGE, *supra* note 8, at 26–27.

presidents began to “go public,”<sup>15</sup> influencing public opinion as a way to influence Congress indirectly.<sup>16</sup> This expanded the role of the press as a largely private institution<sup>17</sup> that, nonetheless, plays a crucial part in democracy.<sup>18</sup>

A politician’s message thus became a product of four factors: the questions that reporters posed, the answers they received, their understanding and evaluation of those answers, and their representation of the information to an audience.<sup>19</sup> Some politicians have seemed at ease with this arrangement. President Franklin Roosevelt invited reporters into the Oval Office for warm, informal sessions, in which reporters might learn nothing but realize it only later.<sup>20</sup> But other public figures have found the interview to be an “uneasy process of collaboration”<sup>21</sup> with the press.<sup>22</sup> President Dwight Eisenhower used his commanding military bearing<sup>23</sup> for these encounters with the press, standing at a podium, as presidents have done ever since. Friendly banter occurs as only a brief departure from an otherwise formal atmosphere.

The press office, one of five communications offices at the White House,<sup>24</sup> is the president’s main conduit to the national media.<sup>25</sup> The press secretary typically meets with the president daily<sup>26</sup> and is the one administration official who has the authority to speak for the president.<sup>27</sup> The press secretary has many informal conversations with reporters,<sup>28</sup> tries to

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<sup>15</sup> IYENGAR, *supra* note 13, at 194–95.

<sup>16</sup> *Id.* at 195.

<sup>17</sup> *Id.* at 5.

<sup>18</sup> C. Edwin Baker, *The Media that Citizens Need*, 147 U. PA. L. REV. 317, 343 (1998).

<sup>19</sup> CLAYMAN & HERITAGE, *supra* note 8, at 27.

<sup>20</sup> Jean Edward Smith, Opinion, *Obama, F.D.R. and Taming the Press*, N.Y. TIMES BLOG (Feb. 2, 2009, 6:15 PM) [https://100days.blogs.nytimes.com/2009/02/02/obama-fdr-and-taming-the-press/comment-page-1/?\\_r=0](https://100days.blogs.nytimes.com/2009/02/02/obama-fdr-and-taming-the-press/comment-page-1/?_r=0) (“Roosevelt fielded whatever the press tossed out . . . . ‘Mr. Roosevelt’s features expressed amazement, curiosity, sympathy, decision, playfulness, dignity and surpassing charm,’ the journalist John Gunther noted . . . ‘But I never met anyone who showed greater capacity for avoiding a direct answer while giving the questioner a feeling that his question had been answered.’”).

<sup>21</sup> CLAYMAN & HERITAGE, *supra* note 8, at 27 (“New dependencies emerged—on the wit and motivation of the reporter to ask the right questions, and to understand and represent the import of the answers.”).

<sup>22</sup> *Id.* at 27.

<sup>23</sup> Smith, *supra* note 20.

<sup>24</sup> IYENGAR, *supra* note 13, at 200 (providing a diagram of White House communication offices and listing the other four offices as speechwriting, media affairs, communications, and global communications).

<sup>25</sup> *Id.* at 201.

<sup>26</sup> *See id.* at 208–09.

<sup>27</sup> MARTHA JOYNT KUMAR, *MANAGING THE PRESIDENT’S MESSAGE* 178 (2010).

<sup>28</sup> *Id.* at 199.

round up accurate information for them from executive branch offices,<sup>29</sup> and also tries to glean information from the reporters to relay back to the president.<sup>30</sup> The press office also makes administration officials available for network news broadcasts.<sup>31</sup>

The press secretary is most visible at press briefings, which have traditionally been held twice daily.<sup>32</sup> The formal, on-camera briefing is generally held in the afternoon in the James S. Brady Press Briefing Room at the White House.<sup>33</sup> The press office issues credentials to reporters.<sup>34</sup> Some eight thousand reporters have them,<sup>35</sup> but the Briefing Room has only forty-nine seats and a limited amount of standing room. News organizations get their seat assignments from their own elected organization, the White House Correspondents Association (WHCA), a 501(c)(3) organization designed to provide a forum for White House reporters and to promote “friendly relations and the exchange of ideas among its members.”<sup>36</sup>

The seat-assignment practice began in 1981, allowing the Reagan White House to avoid the appearance of favoritism.<sup>37</sup> The front two rows, of seven seats each, currently go to news outlets that are among the most established of the “mainstream media.” These are four newspapers: the *New York Times*, *USA Today*, the *Wall Street Journal*, and the *Washington Post*; three wire services: Bloomberg, Reuters, and the Associated Press; the news divisions of three broadcast networks: ABC, NBC, and CBS (along with CBS Radio); two cable channels: CNN and Fox News; and National Public Radio

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<sup>29</sup> *Id.* at 205.

<sup>30</sup> *Id.* at 213.

<sup>31</sup> *Id.* at 202.

<sup>32</sup> *Id.* at 208.

<sup>33</sup> *Life in the White House: A Press Pool, Life in the Press Briefing Room*, THE WHITE HOUSE, <https://georgewbush-whitehouse.archives.gov/history/life/pressbriefingroom.html> (last visited Sept. 14, 2018) (documenting the renaming of the Press Briefing Room on Feb. 11, 2000 to honor former press secretary James Brady, who was shot and injured in 1981 when a gunman tried to assassinate President Ronald Reagan).

<sup>34</sup> IYENGAR, *supra* note 13, at 201.

<sup>35</sup> DORIS A. GRABER & JOHANNA DUNAWAY, *MASS MEDIA AND AMERICAN POLITICS* 190 (9th ed. 2015).

<sup>36</sup> Art. II, White House Correspondents’ Association By-Laws (as amended June 1, 2011). The Association also aims to educate the public about the field of journalism and to distribute scholarships to journalism students. [http://www.whca.net/2015WHCA\\_Declaration.pdf](http://www.whca.net/2015WHCA_Declaration.pdf) (last visited Apr. 9, 2018).

<sup>37</sup> Larry Buchanan & Karen Yourish, *All Joking Aside, Here’s How Sean Spicer Is Shaking Up the White House Press Briefing*, N.Y. TIMES (Feb. 11, 2017), <https://www.nytimes.com/interactive/2017/02/11/us/politics/sean-spicer-white-house-press-briefing.html>.



(NPR).<sup>38</sup> White House correspondents enjoy a high level of prestige in their newsrooms and in Washington, D.C., but the content of their jobs is largely taking notes and staying near the president—to the extent possible—just in case anything unexpected happens.<sup>39</sup>

Many presidents have distrusted the press, or at least segments of it. President Kennedy viewed the press as Republican-controlled. President Nixon preferred small, regional publications over the national media, whose reporting eventually would drive him from office. President Clinton and President George W. Bush preferred being interviewed by broadcast anchors rather than more savvy beat reporters.<sup>40</sup> President Obama saw Fox News as a political opponent<sup>41</sup> after chairman Roger Ailes reportedly described his channel as “the Alamo” in its stand against the president’s policies.<sup>42</sup> Obama circumvented and sometimes infuriated the press by turning the White House government website into “a sprawling multimedia operation”<sup>43</sup> that sometimes

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<sup>38</sup> Hadas Gold, *On Media: Conservative Outlets Get More Official Seats in White House Briefing Room*, POLITICO (June 20, 2017, 5:15 PM), <https://www.politico.com/blogs/on-media/2017/06/30/conservative-outlets-gain-white-house-seats-240152> (including a Briefing Room seating chart that shows in Row 3: Agence France Presse, Associated Press Radio, McClatchy, American Urban Radio Networks, Politico, *Tribune*, and ABC Radio; Row 4: MSNBC, *Washington Times*, *The Hill*, FOX News Radio, Voice of America, *National Journal*, and a seat for a foreign pool reporter; Row 5: Bloomberg BNA, *Time Magazine*, Sirius XM, RealClearPolitics, a seat for regional media, a seat shared by the *Christian Science Monitor* and the *New York Post*, and a seat shared by Al Jazeera and the Public Broadcasting System; Row 6: the *Washington Examiner*, Yahoo! News, Salem Radio Network, Newsmax, *Daily Mail*, Westwood One, and a seat shared by HuffPost and the *New York Daily News*; Row 7: Dallas Morning News, CBN, a seat shared by Talk Radio News Service and Univision, a seat shared by the *Boston Globe* and *Roll Call*, a seat shared by the BBC and One America News Network, a seat shared by BuzzFeed and the *Daily Beast*, and a seat shared by the *Financial Times* and the *Guardian*).

<sup>39</sup> Michael Nelson, *Why the Media Love Presidents and Presidents Hate the Media*, 76 VA. Q. REV. 255, 265 (2000).

<sup>40</sup> E-mail from Mark Smith, former Associated Press White House Correspondent and former Pres. of the White House Correspondents’ Ass’n, to Carol Pauli, Assoc. Prof. of Law, Texas A&M Univ. School of Law ¶ 4 (Oct. 30, 2017, 11:30 AM) (on file with author).

<sup>41</sup> Brian Stelter, *Fox’s Volley with Obama Intensifying*, N.Y. TIMES (Oct. 11, 2009), <http://www.nytimes.com/2009/10/12/business/media/12fox.html?mtref=t.co>. See also IYENGAR, *supra* note 13, at 207–08.

<sup>42</sup> Matea Gold, *Fox News’ Glenn Beck Strikes Ratings Gold by Challenging Barack Obama*, L.A. TIMES (March 6, 2009), <http://articles.latimes.com/2009/mar/06/entertainment/et-foxnews6>.

<sup>43</sup> E-mail from Mark Smith to Carol Pauli, *supra* note 40, at ¶ 4.

scooped the press or posted exclusive content that the administration had denied to reporters.<sup>44</sup>

Both the White House and the press corps prepare for their encounters.<sup>45</sup> The president or press secretary typically tries to maintain credibility with reporters<sup>46</sup> while still getting across the intended administration talking points.<sup>47</sup> In this way, journalism scholar Timothy Cook has found, the president uses the press to exercise power. First, the president uses the press to convey statements that constitute actions merely by being uttered, such as when a president issues a warning, an order, or an agreement.<sup>48</sup> Second, the president uses the press to draw the audience into his vision and agenda.<sup>49</sup> Finally, the president uses the press in an effort to persuade the public to support the administration’s agenda.<sup>50</sup>

Traditionally, reporters have stood as gatekeepers, controlling a president’s access to the public by deciding which issue, statements, and events were “newsworthy” and merited the public’s limited time.<sup>51</sup> In some cases, coverage of events has been more important than the events, themselves, in determining public attitudes toward a president.<sup>52</sup> Reporters arrive in the Briefing Room with potential stories in mind and with questions framed to extract specific pieces of information, knowing that an imprecise question may allow the White House to skirt an issue and deprive the reporter of information needed for a story.<sup>53</sup>

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<sup>44</sup> *Id.*

<sup>45</sup> IYENGAR, *supra* note 13, at 318 (expressing concern that growing attention to media management takes valuable White House resources away from the work of policy development).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 202.

<sup>48</sup> See COOK, *supra* note 4, at 124 (2005).

<sup>49</sup> *Id.* at 127–28 (quoting Harvey Molotch & Marilyn Lester, *Accidental News: The Great Oil Spill as Local Occurrence and National Event*, 81 Am. J. Soc. 235, 237 (1976) (“[O]ne dimension of power can be construed as the ability to have one’s account become the perceived reality of others . . . . And since access to media is a crucial ingredient in creating and sustaining the realities of publics, a study of such access is simultaneously a study of power relationships.”)).

<sup>50</sup> *Id.* at 124.

<sup>51</sup> Timothy E. Cook, *The News Media as a Political Institution: Looking Backward and Looking Forward*, 23 Pol. Comm. 159, 162 (2006) (“[T]he news never mirrors exactly what officials say or do, even under the most favorable conditions. Newswriters reserve for themselves the final control over the news, which draws on journalistic definitions of news values at least as much as officials’ preferences for optimal communication.”).

<sup>52</sup> IYENGAR, *supra* note 13, at 312 (reporting that news coverage of post-9/11 terrorism has been a better predictor of presidential popularity than actual incidents of terrorism).

<sup>53</sup> GRABER & DUNAWAY *supra* note 35, at 192–95.

### B. *The Parties and Their Power, Generally*

The White House would appear to have an upper hand in negotiating with the press. The President of the United States wields unparalleled power. The executive branch is the only branch of Federal Government that is personalized in one man.<sup>54</sup> As head of state, he has the “bully pulpit” of office,<sup>55</sup> from which to persuade the nation to follow his vision.<sup>56</sup> As chief executive, he can issue orders and set law enforcement priorities. As commander in chief of the armed forces, he can call out troops and deploy them. Such an ability—to enlist others to get one’s own way, even over their opposition—is a definition of power,<sup>57</sup> and power matters in negotiation.<sup>58</sup> Any administration begins a White House press briefing with at least two forms of negotiation power: organizational power and informational power.<sup>59</sup> The president occupies the highest office in the land, and he possesses information that reporters want.<sup>60</sup>

Political scientist Brian Fogarty has described the president-press relationship as a game of “ultimatum.”<sup>61</sup> In this model, a president offers his preferred story and reporters may accept or reject it.<sup>62</sup> If they accept it, they

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<sup>54</sup> Nelson, *supra* note 39, at 268.

<sup>55</sup> IYENGAR, *supra* note 13, at 196 (pointing out the power of a popular president).

<sup>56</sup> Cable News Network, Inc. v. Am. Broad. Companies, Inc., 518 F. Supp. 1238, 1245 (N.D. Ga. 1981).

<sup>57</sup> Robert S. Adler & Elliot M. Silverstein, *When David Meets Goliath: Dealing with Power Differentials in Negotiations*, 5 HARV. NEGOT. L. REV. 1, 8–9 (2000) (“[T]he critical test of power is whether one’s goals can be met even when charm and persuasiveness prove inadequate to the task.”).

<sup>58</sup> *Id.* at 4–5 (2000) (“The degree of power that each party brings to the negotiation affects the room for maneuver that each feel[s] is available in bargaining situations.”).

<sup>59</sup> *See id.* at 22–23 (2000) (“In the context of negotiation power, we see at least four sources of power that bear discussion and analysis: (1) personal power, (2) organizational power, (3) informational power, and (4) moral power.”).

<sup>60</sup> Fogarty, *supra* note 5, at 1057 (“Due to the power of the office, and thus the information and access he possesses, the president is often able to dictate the guidelines, information, and framing to the news media.”).

<sup>61</sup> *Id.* at 1057 (“Another bargaining situation where the ultimatum game is appropriate is the interaction between the news media and the president. When the news media go to the president and his administration for source information on various measures, the president often holds informational control.”).

<sup>62</sup> For example, President Clinton’s press secretary, Mike McCurry, said that each day began with a question: “[W]hat’s the news we want to make today versus what’s the news that’s coming at us because that’s going to be the agenda of the press corps that day and how do you reconcile the two and how do you make some guess over which is going to

publish it, with the result that the president gains in public approval. If they reject it, they publish their own version of the story, and the president may lose in public approval.<sup>63</sup> The reporters’ decision is determined by whether the president’s version is sufficiently more valuable to them than the story they can write without him.<sup>64</sup> This model does not require that the reporters aim to present the president in the worst possible light,<sup>65</sup> only that their preferred story is less positive than the president’s preferred story.

Despite the president’s apparent power, having the upper hand may not be enough to win a negotiation.<sup>66</sup> Even in a laboratory, the results of simple, one-time games of ultimatum can defy expectations. Players, like all human beings, do not always make rational choices. An offeree may reject some offers out of such impulses as moral indignation or pride. An offeree may also make a strategic decision to reject an offer in order to establish a reputation as a hard bargainer, just in case there may be future games against the same opponent.<sup>67</sup> By this logic, a journalist may be expected to reject a White House statement—even one that might produce a better story than the journalist’s version—if it is so obviously unsupported as to be insulting or if the reporter wants to build a reputation for toughness.

The ultimatum model is further complicated by the fact that the president-press interaction is not usually a one-time exercise. When a news

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top the other?” Mike McCurry, speech at Stanford University on May 8, 2001, quoted in IYENGAR, *supra* note 13, at 206.

<sup>63</sup> See Fogarty, *supra* note 5, at 1055 (noting that press rejection of a politician’s offer may actually take a range of forms: “The press can discuss certain topics and not others, mention certain sources while ignoring others, prime and frame certain angles they desire. The press can also offer preferential treatment in the tone of coverage.”).

<sup>64</sup> *Id.* at 1059.

<sup>65</sup> Responding to the idea of the press briefing as negotiation, a former White House correspondent cautions, “While it may be true that the White House’s goal is casting the administration in the best possible light, I think it’s wrong to assume all the reporters present want the worst possible light. Or simply to embarrass or excoriate the administration. Frankly, I think most of us would say we’re just about getting at the truth.” E-mail from Mark Smith to Carol Pauli, *supra* note 40, at ¶ 5.

<sup>66</sup> Adler & Silverstein, *supra* note 57, at 6 (“[C]ertain common assumptions about the use of power turn out, upon close scrutiny, to be flawed. For instance, greater power, by itself, does not necessarily produce more favorable agreements for the powerful.”).

<sup>67</sup> 10 *Hard-Bargaining Tactics to Watch Out for in a Negotiation*, PROGRAM ON NEGOTIATION, HARVARD LAW SCHOOL: DAILY BLOG (July 30, 2008), <https://www.pon.harvard.edu/daily/batna/10-hardball-tactics-in-negotiation/> (warning, however, that “[b]ecause negotiators tend to respond in the way they are treated, one party’s negotiation hardball tactics can create a vicious cycle of threats, demands, and other hardball strategies. This pattern can create a hard-bargaining negotiation that easily deteriorates into impasse, distrust, or a deal that’s subpar for everyone involved.”).

story keeps developing, the game keeps repeating.<sup>68</sup> The White House tells its version; reporters pose questions to elicit the information they want; the White House responds; reporters publish a story—or they do not—and they come back to listen and ask more questions the next day about that story or others. Another case of multiple innings occurs when the rules of engagement between the press and the White House become the subject of conflict. Then the rules, themselves, must be negotiated.

In iterative cases like these, with rounds of alternating offers, the game of ultimatum changes. The longer the parties expect the game to last, the more motivated both sides are to make better offers. More iterations of the game equal more questions, and this favors the press.<sup>69</sup> At the extreme, in a hypothetical endless investigation where the reporter has no deadline and can break off the bargaining at any time, the politician would offer more information in order to remain relevant and stay involved in the production of the story.<sup>70</sup>

Other factors, however, shift the outcome back in favor of the president. Delay favors the White House. Journalists work on tight deadlines.<sup>71</sup> White House reporters are expected to file at least one story every day,<sup>72</sup> not to miss a story that others have, and to get an exclusive story periodically.<sup>73</sup> Thus, they value today's information much more than the same information tomorrow, and that gives leverage to the president.<sup>74</sup> A reporter may have no choice but to publish a story that tilts toward the president.<sup>75</sup> For these reasons, presidential stalling can hurt reporters generally, and favoritism can hurt them individually.

The president's access to secret information also shifts the dynamic in his favor by giving the president a broad ability to bluff. In a negotiation, a

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<sup>68</sup> Fogarty limits his use of the one-time ultimatum game to specific news situations, including the press-president relationship, but he writes that most political news is better described as a series of alternating offers. Fogarty, *supra* note 5, at 1059.

<sup>69</sup> *See id.*

<sup>70</sup> *Id.* at 1062.

<sup>71</sup> Cook, *supra* note 51, at 162 (“[N]ewswriters rely on similar means to routinely crank out a defensible daily product. The similarity emerges under several conditions: tight deadlines, high uncertainty about what is important and interesting enough to be called news, and the desire to limit outside interference by laying claim to professional norms.”).

<sup>72</sup> Nelson, *supra* note 39, at 267.

<sup>73</sup> *Id.* at 268.

<sup>74</sup> Fogarty, *supra* note 5, at 1060 (“[N]egotiating with a journalist who has a close deadline can be profitable for a politician hoping to control content. Luckily for politicians, most journalists do face immediate deadlines thus allowing for more leverage in negotiations than would be gained with other journalists such as investigative reporters.”).

<sup>75</sup> *Id.*

bluff is just as effective as real strength if the other side believes it.<sup>76</sup> Because reporters do not know the extent of the president’s knowledge, he can claim to possess more—or different—information than he actually has. Historic examples come readily to mind, including President Clinton’s denial that he had sexual relations with a White House intern and President Bush’s claim that Iraq had weapons of mass destruction.<sup>77</sup> Reporters, by contrast, routinely reveal the limits of their own information because they keep publishing what they know. In the daily news cycle, the White House and the press continually see the result of their negotiation.<sup>78</sup> Of course, neither side knows what the other may do tomorrow or what new strategies, allies, or words the other side will enlist.

Nonetheless, the press has some advantages even in shorter-term games. A new press secretary quickly learns the ground rules of the Briefing Room, whose long history is sustained by news reporters.<sup>79</sup> Also, reporters have had an advantage in that, unlike the White House, they traditionally have not had to answer questions or respond on camera to criticism.<sup>80</sup> Thus, they also face less of a burden to act with decorum. Although it is rare for a reporter to flatly contradict an interview subject,<sup>81</sup> reporters often ask questions aggressively,<sup>82</sup> and they are rewarded for doing so.<sup>83</sup> Interview subjects at the podium must respond forthrightly or, at least, minimize any impression that

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<sup>76</sup> Adler & Silverstein, *supra* note 57, at 13 (“The critical test of one’s effectiveness in a negotiation is what one has convinced an opponent that one can do, whether or not one can actually do it. Unless exposed as bluffers, parties that convince their opponents that they have more power than they really do will generally be able to exercise the power they have asserted.”).

<sup>77</sup> See IYENGAR, *supra* note 13, at 93–94.

<sup>78</sup> Former White House press secretary Mike McCurry recalled, “[E]verybody would kind of watch the news collectively at 6:30 and 7, and that was your report card at the end of the day because either your story made it and you got that out there, or something else came in to dominate the storyline about the White House that day.” *Id.* at 207.

<sup>79</sup> KUMAR, *supra* note 27, at 223 (“When Ari Fleischer became George W. Bush’s press secretary on January 20, 2001, he inherited a set of routines, expectations, and tacit understandings that had been developed very gradually over the course of a century . . . . As press secretaries soon find, the continuities in rules, practices, and reporters covering the institution remain fairly constant within and between administrations.”).

<sup>80</sup> See generally CLAYMAN & HERITAGE, *supra* note 8, at 140.

<sup>81</sup> *Id.* at 146 (2002).

<sup>82</sup> Nelson, *supra* note 39, at 266.

<sup>83</sup> CLAYMAN & HERITAGE, *supra* note 8, at 30 (“There are thus real career incentives for journalists who wish to achieve or maintain elite status to engage in the kind of questioning the public figures are most inclined to dislike and resist.”).

they are evading or resisting.<sup>84</sup> And, more than other interviewees, who can boycott an annoying reporter,<sup>85</sup> the White House has to endure the questions. It may favor certain reporters<sup>86</sup> and ignore<sup>87</sup> or punish others,<sup>88</sup> and it may even plant softball questions and friendly questioners in the room,<sup>89</sup> but the White House cannot reject reporters outright.<sup>90</sup>

Reporters assigned to cover the White House are entitled to an appropriate security clearance in all but the most extreme cases. The U.S. Secret Service, in responding to an application for a White House press pass, "will be guided solely by the principle of whether the applicant presents a potential source of physical danger to the President and/or the family of the President so serious as to justify his or her exclusion from White House press privileges."<sup>91</sup> Once a president has made the White House press facilities available, reporters are protected by the First Amendment from being denied access for reasons that are less than compelling.<sup>92</sup> On the other hand, if the White House calls a press conference, the press need not show up at all.

Both the president and the press have alternatives if the negotiation breaks down. For the White House, the best alternative to a negotiated agreement (BATNA) has always included presenting favorable information independently of the press by giving a speech or other statement to the nation.

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<sup>84</sup> See *id.* at 297 ("[I]n the contemporary news interview, answering questions remains a formidable social convention imbued with a powerful normative force. Resistant or evasive responses, while frequent, are done cautiously and are managed with an elaborate array of remedial practices that work to ameliorate the breach of conduct.").

<sup>85</sup> *Id.* at 28–29.

<sup>86</sup> *Sherrill v. Knight*, 569 F.2d 124, 129 (D.C. Cir. 1977) ("It would certainly be unreasonable to suggest that because the President allows interviews with some bona fide journalists, he must give this opportunity to all.")

<sup>87</sup> GRABER & DUNAWAY *supra* note 35, at 182.

<sup>88</sup> IYENGAR, *supra* note 13, at 208 (recounting President Obama's exclusion of Fox News from the networks he appeared on one Sunday in September 2009).

<sup>89</sup> *Id.* at 212–13.

<sup>90</sup> *Sherrill*, 569 F.2d at 129–30 ("Not only newsmen and the publications for which they write, but also the public at large have an interest protected by the [F]irst [A]mendment in assuring that restrictions on newsgathering be no more arduous than necessary, and that individual newsmen not be arbitrarily excluded from sources of information.").

<sup>91</sup> 31 C.F.R. § 409.1.

<sup>92</sup> *Sherrill*, 569 F.2d at 129–30 (citing *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491–92, (1975); *Abrams v. United States*, 250 U.S. 616, 630, (1919) (Holmes, J., dissenting); *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) ("right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection") (L. Hand, J.)).

Franklin Roosevelt used radio to talk intimately with Americans at home.<sup>93</sup> Kennedy, who played well to cameras,<sup>94</sup> was the first to conduct press conferences on live television and let home audiences see his performances unfiltered.<sup>95</sup> Although getting airtime has become more difficult for presidents,<sup>96</sup> the rise of social media has created a new Presidential BATNA by giving the White House independent lines of communication to the public. For reporters, the BATNA has typically included gathering information from other sources. Without White House participation, a story may lose some power,<sup>97</sup> but the president may also lose some public approval.<sup>98</sup>

### C. *Ghosts in the Briefing Room*

The buyer-seller model of negotiation offers a helpful framework for analysis, but it does not account for bargaining in all conflicts.<sup>99</sup> Disagreements between buyers and sellers, usually about concerns such as price and delivery, fall within an accepted structure.<sup>100</sup> But disagreements in politics may stir deeper issues, such as the identities, cultures, and social relationships of the parties.<sup>101</sup> These disagreements may challenge the political structure, itself.<sup>102</sup> Addressing these concerns requires more than one transaction,<sup>103</sup> preferably repeated over time.<sup>104</sup>

Bargaining may also be complicated by the parties' histories, lurking invisibly like ghosts.<sup>105</sup> At the White House, where presidents have lived since

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<sup>93</sup> Nelson, *supra* note 39, at 256.

<sup>94</sup> IYENGAR, *supra* note 13, at 212.

<sup>95</sup> Nelson, *supra* note 39, at 257.

<sup>96</sup> *Id.* (explaining that broadcast networks may shrug off a speech because CNN or C-SPAN will cover it).

<sup>97</sup> Fogarty, *supra* note 5, at 1057–58.

<sup>98</sup> *Id.* at 1065 (“When the politician refuses to negotiate with the media, each journalist will report his or her version, and the politician subsequently loses approval.”).

<sup>99</sup> Robert Ricigliano, *A Three-Dimensional Analysis of Negotiation*, in THE NEGOTIATOR’S FIELDBOOK: THE DESK REFERENCE FOR THE EXPERIENCED NEGOTIATOR 55, 56–57 (Andrea Kupfer Schneider & Christopher Honeyman, eds., 2006).

<sup>100</sup> *Id.*

<sup>101</sup> *See id.* at 56.

<sup>102</sup> *See id.* at 56–57.

<sup>103</sup> *Id.* at 58.

<sup>104</sup> *Id.* at 59.

<sup>105</sup> Adrian Borbély & David Matz, *How to Learn About Negotiation from Full Length Descriptions of Real Events*, 2017 J. DISP. RESOL. 41, 42–43 (2017) (“There may be only two speakers in the room, or two heterogeneous teams of negotiators, each with their own individual agendas; but there is also a sizable cast of what we would call *ghosts*” (emphasis in original)).



1800 and the press has had a workspace since 1902,<sup>106</sup> it would be surprising if history did *not* influence both the president and the press, inspiring each party's sense of mission and undergirding its sense of right and wrong.<sup>107</sup> In addition, each news outlet in the Briefing Room has its own history, in some cases a story that defines its culture and echoes its approach to covering the White House.<sup>108</sup> Some of these stories are legendary. Glimpses of the best known are enough to sketch this background.

Traditionally, the first news organization to ask a question at each White House press briefing has been the Associated Press (AP). A not-for-profit cooperative, the AP traces its origin to an 1846 pony express project among five New York newspapers.<sup>109</sup> With the advent of the telegraph, the AP began sharing stories over the wire among the newspapers, which were politically polarized in that day.<sup>110</sup> To ensure that its stories would be usable across political lines, the AP business model championed unadorned, factual reporting, which set a standard for American journalism.

The *New York Times* was founded in 1851 as a reaction against the city's sensationalistic "yellow journalism."<sup>111</sup> It used calmer reporting and drew a more educated readership.<sup>112</sup> The *Times* considers itself "the newspaper of record" and takes this role seriously enough that, when one of its reporters was found to have fabricated stories, the *Times*—after firing him—assigned

<sup>106</sup> James A. Jacobs, *The President, the Press, and Proximity: The Creation of the White House Press Center*, THE WHITE HOUSE HISTORICAL ASSOCIATION, <https://www.whitehousehistory.org/the-president-the-press-and-proximity> (last visited Apr. 6, 2018).

<sup>107</sup> Borbély & Matz, *supra* note 105, at 43 ("History leaves us with understandings about what causes what, about what constitutes virtue and vice, about how values evolve in a negotiation, about what we can rely on and how we can live with risk. Every negotiating move embodies our understandings/memory of those histories.").

<sup>108</sup> Marcia Caton Campbell & Jayne Seminare Docherty, *What's in a Frame?*, in THE NEGOTIATOR'S FIELDBOOK: THE DESK REFERENCE FOR THE EXPERIENCED NEGOTIATOR 37, 39 (Andrea Kupfer Schneider & Christopher Honeyman, eds., 2006) ("Even before parties encounter one another in a conflict, they hold large cognitive frames that can usefully be thought of as worldmaking stories. Worldmaking stories are narratives that are told and retold by many people; they become symbolic focal points around which organizations, communities, and civilizations shape their collective lives.").

<sup>109</sup> *Our Story*, AP, <https://www.ap.org/about/our-story/> (last visited Apr. 6, 2018).

<sup>110</sup> Nelson, *supra* note 39, at 259.

<sup>111</sup> *Ethical Journalism: A Handbook of Values and Practices for the News and Editorial Departments*, N.Y. TIMES, [http://www.nytc.com/wp-content/uploads/NYT\\_Ethical\\_Journalism\\_0904-1.pdf](http://www.nytc.com/wp-content/uploads/NYT_Ethical_Journalism_0904-1.pdf) ("The goal of The New York Times is to cover the news as impartially as possible—'without fear or favor,' in the words of Adolph Ochs, our patriarch.") (last visited Apr. 6, 2018).

<sup>112</sup> Nelson, *supra* note 39, at 259–60.

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several staff members the job of re-researching all his stories and printing corrected versions, each with an editor’s note of explanation.<sup>113</sup>

At CBS News, the oldest of the broadcast networks, the newsroom culture looks back to Edward R. Murrow, whose first-person radio reports took American listeners to the air raids in London and the liberation of the Nazi death camp at Buchenwald.<sup>114</sup> After World War II, Murrow departed from purely objective journalism when he covered the bombastic Senator Joseph McCarthy. McCarthy claimed that Communists were rife among politicians, entertainers, academics, and everyday Americans.<sup>115</sup> He skillfully used the news media, which felt honor-bound to report both sides of such claims.<sup>116</sup> Murrow departed from such shallow, formulaic writing, turning instead to fact-based reporting with a moral viewpoint, which helped to turn public opinion against McCarthy.

The *Washington Post* rose to national prominence through its investigation of the Watergate crimes and cover-up committed by the Nixon administration. Ever since, distrust of the White House has dominated press attitudes.<sup>117</sup> It is also worth noting that not a single Watergate story came from the White House press corps.<sup>118</sup>

### D. Zone of Possible Agreement

To succeed, a negotiation requires the existence of a range of outcomes that would be acceptable to both parties. In the Briefing Room, this zone of possible agreement (ZOPA) would begin with the White House yielding information that was just barely better than what the press could find on its own, and the press publishing a story yielding just barely more public approval than the president could get on his own. The ZOPA would stretch, theoretically, to a point where the White House responded to reporters with as

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<sup>113</sup> Dan Barry et al., *Correcting the Record: Times Reporter Who Resigned Leaves Long Trail of Deception*, N.Y. TIMES (May 11, 2003), <http://www.nytimes.com/2003/05/11/us/correcting-the-record-times-reporter-who-resigned-leaves-long-trail-of-deception.html>.

<sup>114</sup> The Murrow Center, *The Life and Work of Edward R. Murrow: An Archives Exhibit*, TUFTS U., <http://dca.lib.tufts.edu/features/murrow/exhibit/cbseurope.html> (last visited Apr. 6, 2018).

<sup>115</sup> Nelson, *supra* note 39, at 260.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 264 (quoting a *Newsweek* editor who complained that “reporters vie with each other to see who can ask the toughest questions and never let Watergate happen to us again”).

<sup>118</sup> *Id.* at 261.

much transparency as it could stand, and the press offered its maximum amount of trust.<sup>119</sup>

Missing from this analysis, however, are the principals: the members of the public. Ideally, the press serves as their agent,<sup>120</sup> as does the president. Where, in the ZOPA, is the public best served? The answer may depend on one's theory of democracy, but two functions transcend even conflicting theories: the press must provide information, and it must function as a watchdog.<sup>121</sup> So the ideal situation from the public point of view, would be one in which administration officials would be transparent; reporters would quote them accurately; and reporters would document both the successes and failures of policies. That is, even a completely cooperative administration would expect and accept negative coverage, as long as it was based in diligent reporting and honest disagreements. This is the ideal that has been expressed by both journalists and former presidents.

In terms of bargaining, this situation would most likely exist when the press is patient and investigative, but even this kind of press may not tell the public what it most needs to know. Investigative journalism favors stories about scandals and, as political scientist Michael Nelson points out, "[n]ot only is scandal not typical of government, it is not typical of the problems of government."<sup>122</sup> Instead, members of the public need information on which to gauge the president's performance.<sup>123</sup>

### III. THE NEW ADMINISTRATION

Fresh from the grandeur of inaugural ceremonies, a new president usually enjoys a honeymoon period with the news media,<sup>124</sup> a time for "gee whiz" stories about the new White House resident and his plans.<sup>125</sup> Both press and president can win in these friendly opening rounds of ultimatum. But the Trump White House had no honeymoon.

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<sup>119</sup> KUMAR, *supra* note 27, at 181. This fits a description from Roman Popadiuk, deputy press secretary for President George W. Bush, who said that his goal was "to have the reporter have . . . as much information as possible, because I felt that made a better story for us, build a trust with the reporter and me personally . . . and as a result of that, give me more credibility in the future with that reporter."

<sup>120</sup> *Richmond Newspapers v. Va.*, 448 U.S. 555, 586 n.2 (1980) (Brennan, J., concurring); *Saxbe v. Wash. Post Co.*, 417 U.S. 843, 863 (1974) (Powell, J., dissenting); *Cable News Network, Inc. v. Am. Broad. Cos.*, 518 F. Supp. 1238, 1244 (N.D. Ga. 1981).

<sup>121</sup> Baker, *supra* note 18, at 350.

<sup>122</sup> Nelson, *supra* note 39, at 262.

<sup>123</sup> *Cable News*, 518 F. Supp. at 1244.

<sup>124</sup> IYENGAR, *supra* note 13, at 206.

<sup>125</sup> Nelson, *supra* note 39, at 262.

A. *The Parties and Their Power, 2016–2017*

Donald Trump brought to his presidency a long and complicated relationship with the press. He had known politicians who feared the press,<sup>126</sup> but he boasted that he understood reporters: “[I]f you are a little different, or a little outrageous, or if you do things that are bold or controversial, the press is going to write about you. I’ve always done things a little differently, I don’t mind controversy, and my deals tend to be somewhat ambitious . . . . The result is that the press has always wanted to write about me.”<sup>127</sup>

The coverage had not always been favorable. Trump had been called “a page-six president,” a reference to the gossip page of the tabloid *New York Post*.<sup>128</sup> Newsrooms had laughed over incidents, early in his career, in which he allegedly had posed as his own spokesman, promoting himself and leaking his own information in phone calls with the media.<sup>129</sup> One editor remembered him as “a marginal self-promoting buffoon in the jokescape of eighties and nineties New York.”<sup>130</sup> That image was on display when Trump attended the 2011 White House Correspondents’ Dinner. As a guest of the *Washington Post*, Trump was mingling in good spirits until he apparently was caught off-guard by the evening’s humor. His fledgling presidential hopes had been targeted for ridicule by both Obama and comedian Seth Meyers.<sup>131</sup> To be sure,

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<sup>126</sup> Trump, *supra* note 1, at 306 (“If there’s one thing I’ve learned from dealing with politicians over the years, it’s that the only thing guaranteed to force them into action is the press—or more specifically, fear of the press . . . . Bad press translates into potential lost votes, and if a politician loses enough votes, he won’t get reelected.”).

<sup>127</sup> *Id.* at 56.

<sup>128</sup> Glenn Thrush, *How to Cover a Page Six President*, POLITICO (Nov. 28, 2016, 10:07 AM), <http://www.politico.com/story/2016/11/maggie-haberman-trump-new-york-times-231873>.

<sup>129</sup> Callum Borchers, *The Amazing Story of Donald Trump’s Old Spokesman, John Barron—Who Was Actually Donald Trump Himself*, WASH. POST (May 13, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/03/21/the-amazing-story-of-donald-trumps-old-spokesman-john-barron-who-was-actually-donald-trump-himself/>. But see Eric Bradner, *Manafort: Trump Wasn’t Posing as his own Publicist*, CNN (May 15, 2016, 10:42 AM), <http://www.cnn.com/2016/05/15/politics/donald-trump-paul-manafort-john-miller/index.html>.

<sup>130</sup> David Remnick, *An American Tragedy*, THE NEW YORKER (Nov. 9, 2016), <https://www.newyorker.com/news/news-desk/an-american-tragedy-2>.

<sup>131</sup> David Folkenflik, *#NeverTrump Efforts Could Take Tips from 2011 Correspondents Dinner*, NPR (Apr. 15, 2016, 4:34 PM), <http://www.npr.org/2016/04/15/474411511/gop-efforts-to-take-down-trump-echo-2011-white-house-correspondents-dinner> (quoting Meyers as saying, “Donald Trump has been

barbs are the norm at the annual dinner—and Trump had thrust himself into the political arena by questioning whether Obama’s birthplace had been in the United States—but as the glittering audience of politicians and celebrities laughed at Trump and applauded, Trump sat expressionless.<sup>132</sup> He left with his wife quickly afterward.<sup>133</sup>

The 2016 Trump campaign bore out the belief that “bad publicity is sometimes better than no publicity at all.”<sup>134</sup> Trump thrived on free coverage of what most news outlets considered to be his missteps. As though spellbound, mainstream reporters, while questioning their own attraction to Trump stories, kept writing them.<sup>135</sup> Revenues climbed.<sup>136</sup> Trump kept promoting himself, too, by opening his own line of communication with the public. Where, as candidates, Bill Clinton had connected with voters via late-night television<sup>137</sup> and Obama had used emails and the Internet,<sup>138</sup> Trump had focused on Twitter. After opening his Twitter account in 2009, Trump approached the 2016 election with more than four million followers.<sup>139</sup> That was about the same number as his opponent, Hillary Clinton,<sup>140</sup> but his messages carried further; he was retweeted more than twice as often and

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saying he will run for president as a Republican—which is surprising, since I just assumed he was running as a joke”).

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> Trump, *supra* note 1, at 176.

<sup>135</sup> Michael M. Grynbaum & Sydney Ember, *Trump Calls TV Figures for Private Meeting, and Lets Them Have It*, N.Y. TIMES (Nov. 21, 2016), <https://www.nytimes.com/2016/11/21/business/media/trump-summons-tv-figures-for-private-meeting-and-lets-them-have-it.html> (reporting that broadcast news executives “conceded that, early in the race, the president-elect was granted too much free exposure”).

<sup>136</sup> Paul Bond, *Leslie Moonves on Donald Trump: “It May Not Be Good for America, but It’s Damn Good for CBS”*, HOLLYWOOD REPORTER (Feb. 29, 2016, 11:25 AM), <http://www.hollywoodreporter.com/news/leslie-moonves-donald-trump-may-871464> (as viewership climbed and attracted advertisers, CEO Leslie Moonves told a Morgan Stanley conference that the campaign “may not be good for America, but it’s damn good for CBS”).

<sup>137</sup> IYENGAR, *supra* note 13, at 157 (noting Clinton’s campaign appearances on the *Arsenio Hall Show* and on MTV).

<sup>138</sup> *Id.* at 141–44 (charting the new-media component of the Obama campaign). See also GRABER & DUNAWAY, *supra* note 35, at 186 (listing Obama White House social media outlets as including email alerts, MySpace, Facebook, and Twitter) (once in the White House, Obama circumvented the press).

<sup>139</sup> Michael Barbaro, *Pithy, Mean and Powerful: How Donald Trump Mastered Twitter for 2016*, N.Y. TIMES (Oct. 5, 2015), <https://www.nytimes.com/2015/10/06/us/politics/donald-trump-twitter-use-campaign-2016.html>.

<sup>140</sup> *Id.*

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mentioned in Twitter conversations more than three times as often as she was.<sup>141</sup>

Trump’s brash style already had been documented in negotiation textbooks. One scholar observed that Trump conveyed personal power in one-on-one encounters<sup>142</sup> and was “accustomed to pushing, pulling, probing, bluffing, feinting, and bullying.”<sup>143</sup> In that sense, he was likened to Chicago community activist Saul Alinsky and war criminal Slobodan Milosevic.<sup>144</sup> The style required displays of power, and it benefitted from Trump’s willingness to leave things feeling unsettled.<sup>145</sup>

The worst thing you can possibly do in a deal is seem desperate to make it. That makes the other guy smell blood, and then you’re dead. The best thing you can do is deal from strength, and leverage is the biggest strength you can have. Leverage is having something the other guy wants. Or better yet, needs. Or best of all, simply can’t do without.<sup>146</sup>

One thing the news media simply cannot do without is credibility—and the mainstream establishment had cause for worry. It had seen the technological revolution disrupt its business model<sup>147</sup> and undermine its position as the gatekeeper of public information.<sup>148</sup> News audiences had become fragmented<sup>149</sup> and polarized, with conservatives and liberals clinging

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<sup>141</sup> *Id.*

<sup>142</sup> Adler & Silverstein, *supra* note 57, at 23 (listing such personal power traits as “intelligence, persistence, courage, physical strength, appearance, celebrity, memory, confidence, awareness, education, interpersonal skills, emotional control, intuition, friendliness, and willingness to take risks.” Trump supporters and detractors would probably disagree on several of these factors.).

<sup>143</sup> Peter S. Adler, *Protean Negotiation*, in *THE NEGOTIATOR’S FIELDBOOK: THE DESK REFERENCE FOR THE EXPERIENCED NEGOTIATOR* 17, 21 (Andrea Kupfer Schneider & Christopher Honeyman, eds., 2006).

<sup>144</sup> *Id.*

<sup>145</sup> *President Trump: Not Business as Usual*, CBS NEWS (Jan. 20, 2017, 9:45 PM), <http://www.cbsnews.com/news/inauguration-2017-president-donald-trump-not-business-as-usual/> (quoting Trump biographer and *Washington Post* reporter Michael Kranish saying, “Certainly he’s a provocateur”).

<sup>146</sup> Trump, *supra* note 1, at 53.

<sup>147</sup> Cook, *supra* note 51, at 160 (“[T]he mass media have been downsized to the point that we can no longer talk about them in the same terms we used, say, in the 1970s and 1980s.”).

<sup>148</sup> Fogarty, *supra* note 5, at 1057.

<sup>149</sup> GRABER & DUNAWAY, *supra* note 35, at 179.

to opposing news sources<sup>150</sup> and inhabiting increasingly seemingly separate realities.<sup>151</sup> In a 2014 survey, Americans said their political opponents were not merely wrong, but a “threat to the nation’s well-being.”<sup>152</sup>

The presidential election pitted the Secretary of State against a candidate whom leaders of both parties had painted as a misogynist and buffoon. Newspapers—even conservative ones—had overwhelmingly endorsed Hillary Clinton and predicted an easy win.<sup>153</sup> But during the campaign, voters turned most often to the two cable news outlets, relative newcomers among media that date back to the pony express. Trump voters primarily watched Fox News while Clinton voters favored CNN.<sup>154</sup> But more was happening than simply a difference in the news sources that people preferred. Instead, on the Internet and on social media, an asymmetric polarization of media outlets had been growing, with many new websites on the far right creating their own media sphere,<sup>155</sup> connecting to and amplifying each other while remaining largely insulated from traditional systems of accountability.<sup>156</sup> Their presence and growing popularity undermined the usual influence of large media companies.<sup>157</sup>

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<sup>150</sup> Amy Mitchell, Jeffrey Gottfried, Jocelyn Kiley & Katerina Eva Matsa, *Section 1: Media Sources: Distinct Favorites Emerge on the Left and Right*, PEW RESEARCH CENTER (Oct. 21, 2014), <http://www.journalism.org/2014/10/21/section-1-media-sources-distinct-favorites-emerge-on-the-left-and-right/> (finding that only one news outlet, the *Wall Street Journal*, was trusted across the political divide).

<sup>151</sup> Joshua Benton, *The Forces that Drove this Election’s Media Failure Are Likely to Get Worse*, NIEMAN LAB (Nov. 9, 2016 2:24 PM), <http://www.niemanlab.org/2016/11/the-forces-that-drove-this-elections-media-failure-are-likely-to-get-worse/> (“American political discourse in 2016 seemed to be running on two self-contained, never-overlapping sets of information. It took the Venn diagram finally meeting at the ballot box to make it clear how separate the two solitudes really are.”).

<sup>152</sup> *Political Polarization in the American Public*, PEW RESEARCH CENTER (June 12, 2014), <http://www.people-press.org/2014/06/12/political-polarization-in-the-american-public/>.

<sup>153</sup> Reid Wilson, *Final Newspaper Endorsement Count: Clinton 57, Trump 2*, THE HILL (Nov. 6, 2016, 7:09 PM), <http://thehill.com/blogs/ballot-box/presidential-races/304606-final-newspaper-endorsement-count-clinton-57-trump-2>.

<sup>154</sup> Jeffrey Gottfried, Michael Barthel & Amy Mitchell, *Trump, Clinton Voters Divided in Their Main Source for Election News*, PEW RESEARCH CENTER (Jan. 18, 2017), <http://www.journalism.org/2017/01/18/trump-clinton-voters-divided-in-their-main-source-for-election-news/>.

<sup>155</sup> Robert Faris et al., *Partisanship, Propaganda, and Disinformation: Online Media and the 2016 Presidential Campaign*, BERKMAN KLEIN CENTER, 18 (2017).

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 25.

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The Trump election victory was more than a surprise. It caught mainstream news organizations “flat footed,” by their own admission.<sup>158</sup> Although reporters are not responsible for the editorial endorsements of their organizations<sup>159</sup>—and reporters are not expected to be fortune-tellers—they were justifiably alarmed because they had failed to grasp a big part of American reality.<sup>160</sup> The editor in chief and publisher of *The Columbia Journalism Review* said that missing the emerging political success of Donald Trump was “among journalism’s great failures, certainly in a generation and probably in modern times.”<sup>161</sup> Now news organizations were soul-searching,<sup>162</sup> scrambling to figure out what had happened,<sup>163</sup> and worried about what would become of them under a president with whom they shared such hostility.<sup>164</sup>

In addition, the prospect of this new administration stirred particular ghosts. As several media outlets would observe, the new president had learned his combative style as an apprentice of an infamous New York attorney, Roy

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<sup>158</sup> David Folkenflik, *Trump Won. The Media Lost. What Next?* NPR (Nov. 9, 2016, 6:12 PM), <http://www.npr.org/2016/11/09/501460470/trump-won-the-media-lost-what-next?>.

<sup>159</sup> But see Cook, *supra* note 51, at 165 (citing Kim Fridkin Kahn & Patrick J. Kenney, *The Slant of the News: How Editorial Endorsements Influence Campaign Coverage and Citizens’ Views of Candidates*, 96 AM. POL. SCI. REV. 381 (2002)) (“[E]ditorial page slant is strongly associated with the slant of the news.”).

<sup>160</sup> Benton, *supra* note 151 (“One way to think of the job journalism does is telling a community about itself, and on those terms the American media failed spectacularly this election cycle. That Donald Trump’s victory came as such a surprise—a systemic shock, really—to both journalists and so many who read or watch them is a marker of just how bad a job we did.”).

<sup>161</sup> Kyle Pope, *Here’s to the Return of the Journalist as Malcontent*, COLUM. JOURNALISM REV. (Nov. 9, 2016), [http://www.cjr.org/criticism/journalist\\_election\\_trump\\_failure.php?](http://www.cjr.org/criticism/journalist_election_trump_failure.php?).

<sup>162</sup> Jim Rutenberg, *Where Will Trump Stand on Press Freedoms?*, N.Y. TIMES (Nov. 14, 2016), <https://www.nytimes.com/2016/11/14/business/media/where-will-trump-stand-on-press-freedoms.html>.

<sup>163</sup> See, e.g., *id.* (“For their part, American newsrooms are conducting their own reassessments, vowing to do a better job covering the issues that animated his supporters, and acknowledging that Mr. Trump tapped into something in the national mood, the power of which they failed to grasp.”).

<sup>164</sup> *Id.* (“Imagine what somebody with a press vendetta and a dim view of the First Amendment would do with that kind of power.”).



Cohn,<sup>165</sup> who had counseled Senator McCarthy's 1950s Communist-hunt<sup>166</sup>—the one that CBS took pride in helping to end. Other facets of the new administration touched other newsroom memories of wars and crises. Trump supporters had included white supremacists.<sup>167</sup> His chief strategist, Steve Bannon, had been quoted as calling himself a Leninist, out to destroy the state.<sup>168</sup> In the Briefing Room, preparing to write the next chapter in the “first rough draft of history,” the ghosts could be chilling.

### B. *White House Moves*

If sources of power are personal, organizational, informational, and moral, then the president likely surpassed the news media on at least the first three. On a personal level, besides being the one-man embodiment of the executive branch of government, Trump had a reputation as a personally engaging and commanding negotiator. Organizationally, he had affirmative powers under the Constitution. Informationally, he had access to intelligence denied to others. As for moral power, the White House and the press appeared to be battling for it, calling each other liars, among other things.

Holding an extreme upper hand risks what Professor William Ury has termed the “power paradox,” which can halt bargaining completely.<sup>169</sup> In this

<sup>165</sup> See *President Trump: Not Business as Usual*, *supra* note 145 (recounting that Roy Cohn had represented Donald Trump and his father in a 1973 Justice Department lawsuit against Trump for racial bias).

<sup>166</sup> Jonathan Mahler & Matt Flegenheimer, *McCarthy Aide Helped Shape Young Trump*, N.Y. TIMES (June 20, 2016), available as *What Donald Trump Learned from Joseph McCarthy's Right-Hand Man*, [https://www.nytimes.com/2016/06/21/us/politics/donald-trump-roy-cohn.html?\\_r=0](https://www.nytimes.com/2016/06/21/us/politics/donald-trump-roy-cohn.html?_r=0) (stating that Trump's “gleeful smearing of his opponents, the embracing of bluster as brand . . . . seemed to have been ripped straight out of the Cohn playbook.”).

<sup>167</sup> Peter Holley, *KKK's Official Newspaper Supports Donald Trump for President*, WASH. POST (Nov. 2, 2016), <https://www.washingtonpost.com/news/post-politics/wp/2016/11/01/the-kkks-official-newspaper-has-endorsed-donald-trump-for-president/> (“Among the small number of American newspapers that have embraced Donald Trump's campaign, there is one, in particular, that stands out. It is called the Crusader—and it is one of the most prominent newspapers of the Ku Klux Klan.”).

<sup>168</sup> Ronald Radosh, *Steve Bannon, Trump's Top Guy, Told Me He Was 'A Leninist'*, DAILY BEAST (Aug. 22, 2016, 1:00 AM), <http://www.thedailybeast.com/articles/2016/08/22/steve-bannon-trump-s-top-guy-told-me-he-was-a-leninist.html>.

<sup>169</sup> Adler & Silverstein, *supra* note 57, at 17 (explaining, “The harder you make it for them to say no, the harder you make it for them to say yes. That is the power paradox.”) (quoting WILLIAM URY, GETTING PAST NO: NEGOTIATING YOUR WAY FROM CONFRONTATION TO COOPERATION 131 (1993)).

situation, a vastly stronger party is tempted to use coercion, while the weaker party digs in its heels, suspicious of every move the stronger one makes.<sup>170</sup> Furthermore, a reliance on brute strength runs counter to the ideal profile of the powerful negotiator, a profile that emphasizes “the ability to plan effectively, to persuade, to remain flexible, and to avoid unnecessary attacks.”<sup>171</sup> In the news media, Trump’s tough talk was not universally convincing. News stories noted that Trump had lost the popular vote, and some painted a picture of a man riddled with doubts about his own ability.

From election night through the first weeks of Trump’s administration, the White House had a number of striking encounters with the news media. They laid the groundwork for the new administration’s relationship with the press. They also prompted a number of theories about the role of the press in the nation’s political life. This section briefly describes these encounters and compares the actions and statements to negotiation strategies.

#### 1. NOVEMBER 22: POSITIONING

Opening moves can establish the tone and power balance in a negotiation, so bargainers do well to choose the venue wisely and to show confidence.<sup>172</sup> Two weeks after the election, some of the media handled the first round more strategically than others. President-elect Trump was conducting his transition process behind closed doors in Trump Tower in New York. Newscasts could show only the brief, dull images that were allowed: footage of people in the lobby waiting for the golden elevators to take them to the meetings. In the off-the-record meetings, Trump complained that the television media had misrepresented him even while using him to boost ratings and revenue.<sup>173</sup>

The *New York Times* made better strategic moves. When the president-elect extended an invitation to the newspaper he has called “the failing New York Times,”<sup>174</sup> the newspaper declined. Instead, the meeting

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<sup>170</sup> Adler & Silverstein, *supra* note 57, at 17.

<sup>171</sup> *Id.* at 23–24.

<sup>172</sup> *Id.* at 19.

<sup>173</sup> Grynbaum & Ember, *supra* note 135.

<sup>174</sup> Phillip Bump, *Donald Trump’s Gripes About the New York Times Are Usually About Stories that Are Shown to be Accurate*, WASH. POST (Nov. 16, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/11/16/donald-trumps-gripes-about-the-new-york-times-are-usually-about-stories-that-are-shown-to-be-accurate> (quoting several of Donald Trump’s tweets that use the phrase, including “The failing

took place on the record and not at Trump Tower.<sup>175</sup> On November 22, 2016 Trump went to the *Times*' headquarters for an exclusive interview with reporters, editors, and columnists.<sup>176</sup> The venue was the boardroom, where the newspaper had leverage in terms of impression management.<sup>177</sup> The room is lined with portraits of former U.S. presidents; each photograph since former President Harry Truman's was given to the newspaper and is signed with good wishes by the president portrayed.<sup>178</sup> In the transcript of the meeting, which the *Times* published the next day, Trump called the newspaper a "great, great American jewel."<sup>179</sup> He said, "I have great respect for the New York Times. Tremendous respect. It's very special."<sup>180</sup> The *Washington Post*'s media columnist commended the paper and noted the nuances of negotiation power: "The paper successfully called Trump's bluff. As much as he professes to despise the Times, he remains in some ways the Queens boy who lusted after Manhattan success and acceptance."<sup>181</sup>

## 2. JANUARY 11: PLAYING TIT-FOR-TAT

The strategy of "tit-for-tat" calls for a negotiator to cooperate on the first move in a negotiation and from then on to mirror the counterpart's next move. If the counterpart is cooperative, then cooperation continues. If the counterpart is combative, then the negotiator responds in the same way but

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@nytimes is truly one of the worst newspapers. They knowingly write lies and never even call to fact check. Really bad people!").

<sup>175</sup> Margaret Sullivan, *What TV Journalists Did Wrong—and the New York Times Did Right—in Meeting with Trump*, WASH. POST (Nov. 22, 2016), [https://www.washingtonpost.com/lifestyle/style/what-tv-journalists-did-wrong--and-the-new-york-times-did-right--in-meeting-with-trump/2016/11/22/54fe17ba-b0d3-11e6-8616-52b15787add0\\_story.html](https://www.washingtonpost.com/lifestyle/style/what-tv-journalists-did-wrong--and-the-new-york-times-did-right--in-meeting-with-trump/2016/11/22/54fe17ba-b0d3-11e6-8616-52b15787add0_story.html) ("The Times played it right. Despite a tweet attack from the president-elect, editors refused to go the off-the-record route with Trump.").

<sup>176</sup> *Trump's Most Important Quotes from His Times Interview, and Why They Matter*, N.Y. TIMES (Nov. 23, 2016), <https://www.nytimes.com/2016/11/23/us/politics/your-guide-to-most-important-quotes-times-trump-interview.html>.

<sup>177</sup> See Adler & Silverstein, *supra* note 57, at 93.

<sup>178</sup> David W. Dunlap, *Times Insider: A Presidential Place of Honor, Unfilled for Now*, N.Y. TIMES (Jan. 26, 2017), <https://www.nytimes.com/2017/01/26/insider/a-presidential-place-of-honor-unfilled-for-now.html> (noting that no Trump portrait has been offered yet).

<sup>179</sup> *Donald Trump's New York Times Interview: Full Transcript*, N.Y. TIMES (Nov. 23, 2016), <https://www.nytimes.com/2016/11/23/us/politics/trump-new-york-times-interview-transcript.html>.

<sup>180</sup> *Id.*

<sup>181</sup> Sullivan, *supra* note 175.

returns to cooperation as soon as the counterpart does.<sup>182</sup> A version of this strategy seemed to occur on January 11, 2017, at the president-elect’s first news conference after the election. He scheduled the session to announce his plans to rearrange some of his finances to decrease conflicts of interest in office,<sup>183</sup> but a news story intervened. It concerned a secret and salacious dossier about Trump, which had been leaked to the press.<sup>184</sup> Most news organizations were withholding it because it was still unconfirmed.<sup>185</sup> However, on January 10, 2018, the website BuzzFeed posted the damaging document,<sup>186</sup> and CNN—without posting the document or linking to it—published its very tentative story: intelligence directors had briefed both Trump and Obama on unconfirmed reports that “Russian operatives claim[ed] to have compromising personal and financial information about Mr. Trump.”<sup>187</sup> CNN reported that the information had been gathered during anti-Trump political research.<sup>188</sup> Trump responded with a tweet: “FAKE NEWS - A TOTAL POLITICAL WITCH HUNT!”<sup>189</sup>

At his news conference, Trump commended the restraint of most news outlets, saying, “I want to thank a lot of the news organizations here today because they looked at that nonsense that was released by maybe the

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<sup>182</sup> Robert Axelrod, *More Effective Choice in the Prisoner’s Dilemma*, 24 J. CONFLICT RESOL. 3, 18 (1980).

<sup>183</sup> Nicholas Fandos, *10 Key Moments and More from Trump’s News Conference*, N.Y. TIMES (Jan. 11, 2017), <https://www.nytimes.com/2017/01/11/us/politics/trump-news-conference-highlights.html>.

<sup>184</sup> Scott Shane, Adam Goldman & Matthew Rosenberg, *Trump Received Unsubstantiated Report that Russia Had Damaging Information About Him*, N.Y. TIMES (Jan. 10, 2017), <https://www.nytimes.com/2017/01/10/us/politics/donald-trump-russia-intelligence.html>.

<sup>185</sup> Alex Johnson, *Unverified Dossier on Trump and Russia Divides Journalists*, NBC NEWS (Jan. 11, 2017, 9:54 PM), <https://www.nbcnews.com/news/us-news/unverified-dossier-trump-russia-divides-journalists-n705926> (“CNN didn’t disclose what was in the documents, saying the allegations hadn’t been verified, and nearly all other major news organizations did the same.”).

<sup>186</sup> Ken Bensinger, Miriam Elder & Mark Schoofs, *These Reports Allege Trump Has Deep Ties to Russia*, BUZZFEED NEWS (Jan. 10, 2017 6:20 PM), <https://www.buzzfeednews.com/article/kenbensinger/these-reports-allege-trump-has-deep-ties-to-russia>.

<sup>187</sup> Evan Perez, Jim Sciutto, Jake Tapper & Carl Bernstein, *Intel Chiefs Presented Trump with Claims of Russian Efforts to Compromise Him*, CNN POLITICS (Jan. 12, 2017, 5:26 PM), <http://www.cnn.com/2017/01/10/politics/donald-trump-intelligence-report-russia/index.html>.

<sup>188</sup> *Id.*

<sup>189</sup> Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 10, 2017, 5:19 PM), <https://twitter.com/realdonaldtrump/status/818990655418617856?lang=en>.

intelligence agencies? Who knows but maybe the intelligence agencies.”<sup>190</sup> Although the commendation was tempered by his next words—suggesting that carrying the story would have been “a tremendous blot on their record”<sup>191</sup>—the President showed respect for those who, in his eyes, had shown respect for him. He especially commended “some news organizations . . . that were so professional—so incredibly professional that I’ve just gone up a notch as to what I think of you.”<sup>192</sup> By contrast, he called BuzzFeed “a failing pile of garbage,”<sup>193</sup> and he demonstrated his disdain for CNN when its reporter, Jim Acosta,<sup>194</sup> tried to ask a question. Rejecting the effort five times, the president-elect finally pointed his finger and said, “You are fake news.”<sup>195</sup>

*a. Tit-for-Tat*

The strategy of rewarding trustworthy acts by being trustworthy and punishing negative acts by being negative reflects Trump’s own personality, but only to a point. “I’m very good to people who are good to me,” he once wrote.<sup>196</sup> That captures the first part of the tit-for-tat strategy, but the rest of his statement went beyond the tit-for-tat strategy: “But when people treat me badly or unfairly or try to take advantage of me, my general attitude, all my life, has been to fight back very hard.”<sup>197</sup> The phrase “very hard” suggests a response that is more punitive than advisable. The tit-for-tat strategy finds success when a negotiator takes the first opportunity to return to a positive move. That is, it works when punishment is followed by forgiveness.

*b. Warning or Threat*

A negotiator sometimes wants to remind an opponent that a bargaining failure will have bad consequences. This may be done as a warning,

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<sup>190</sup> *Full Transcript of Trump Press Conference*, BBC (Jan. 11, 2017), <https://www.bbc.com/news/world-us-canada-38536671>.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> Donald J. Trump, *Remarks by President Trump in Press Conference*, WHITE HOUSE (Feb. 16, 2017), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-press-conference/>. (Jim Acosta is not related to U.S. Labor Secretary Alexander Acosta).

<sup>195</sup> *Full Transcript of Trump Press Conference*, *supra* note 190.

<sup>196</sup> Trump, *supra* note 1 at 58–59.

<sup>197</sup> *Id.*

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defined as “advance notice of a danger.”<sup>198</sup> It may be done as a threat—a “negative promise.”<sup>199</sup> Here, the president-elect’s firepower was trained on just two news outlets, but the incident put all reporters on notice that they might be next to be publicly saluted or condemned. Former House Speaker Newt Gingrich, speaking on Fox News, saw the exchange as symbolic of something even larger—Trump claiming some turf, “draw[ing] the lines for the fight that’s coming.”<sup>200</sup> He urged the president-elect’s press secretary, Sean Spicer, to take a completely negative stance:

[Y]ou don’t have to think of the New York Times or CNN or any of these people as news organizations. They’re mostly propaganda organizations and they’re gonna be after Trump every single day of his presidency . . . and [Trump and Spicer] simply need to go out there and understand, they have it in their power to set the terms of this dialogue. They can close down the elite press.<sup>201</sup>

The same sentiment was echoed—but in dire, negative terms—by a Russian journalist. Alexey Kovalev compared the event to press experiences with Russian President Vladimir Putin.<sup>202</sup> He warned American reporters about Trump, “This man owns you. He understands perfectly well that he is the news. You can’t ignore him. You’re always playing by his rules—which he can change at any time without any notice.”<sup>203</sup>

### 3. JANUARY 21: ANCHORING AND MORE

Anchoring, a move often made early in a negotiation, attempts to influence the value of the thing being negotiated. It is one of a number of possible explanations for the strange session that occurred late Saturday afternoon, on the new president’s first full day in office. His press secretary, Sean Spicer addressed the press informally, beginning with a casual, “Thank

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<sup>198</sup> URY, *supra* note 169, at 137.

<sup>199</sup> *Id.*

<sup>200</sup> *Gingrich: CNN Reporter Jim Acosta Should be Suspended*, FOX NEWS (Jan. 11, 2017), <http://video.foxnews.com/v/5278944135001/?#sp=show-clips>.

<sup>201</sup> *Id.*

<sup>202</sup> See generally Alexey Kovalev, *A Message to My Doomed Colleagues in the American Media*, MEDIUM (Jan. 12, 2017), [https://medium.com/@alexey\\_kovalev/message-to-american-media-from-russia-6e2e76eeae77#.7jcrkw1uf](https://medium.com/@alexey_kovalev/message-to-american-media-from-russia-6e2e76eeae77#.7jcrkw1uf).

<sup>203</sup> *Id.*

you guys for coming,”<sup>204</sup> and said he wanted to “discuss a little bit of the coverage of the last 24 hours.”<sup>205</sup> He spent the rest of the short session scolding the press.<sup>206</sup>

At the January 11 news conference, the President had expressed excitement about his upcoming inauguration.<sup>207</sup> “I think we’re going to have massive crowds because we have a movement,” he said.<sup>208</sup> “It’s a movement like the world has never seen before.”<sup>209</sup> When he looked out during his address, he saw people filling the nearby areas of the mall. In photographs taken from the President’s vantage point, sparse areas farther away, toward the Washington Monument, are minimized by foreshortening. So when the next day’s news reports compared his crowd size unfavorably to President Obama’s inaugural throngs,<sup>210</sup> the reports apparently were surprising and disheartening to Trump. That is what the White House wanted to “discuss” on Saturday.

Spicer delivered a statement, not a discussion. He said that “some members of the media were engaged in deliberately false reporting.”<sup>211</sup> He accused reporters of tweeting out false accounts of the crowd size at the inauguration—a claim that he supported by using inaccurate figures.<sup>212</sup> He charged that the aerial photographs used by the press had framed the ceremonies “to minimize the enormous support that had gathered on the National Mall.”<sup>213</sup> Spicer also criticized one actual press error: a report by a *Time Magazine* correspondent that a bust of Martin Luther King, Jr. had been removed from the Oval Office.<sup>214</sup> The reporter had promptly corrected his

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<sup>204</sup> Sean Spicer, *Statement by Press Secretary Sean Spicer*, WHITE HOUSE (Jan. 21, 2017), <https://www.whitehouse.gov/briefings-statements/statement-press-secretary-sean-spicer/>.

<sup>205</sup> *Id.*

<sup>206</sup> *See id.*

<sup>207</sup> *See Full Transcript of Trump Press Conference*, *supra* note 190.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> Betsy Klein, *Comparing Donald Trump and Barack Obama’s Inaugural Crowd Sizes*, CNN POLITICS (Jan. 21, 2017, 12:48 PM), <https://www.cnn.com/2017/01/20/politics/donald-trump-barack-obama-inauguration-crowd-size/index.html> (“[T]he turnout for the inauguration of President Donald Trump appears to be smaller than that of his predecessor as measured by side-by-side photos of the two events.”).

<sup>211</sup> Spicer, *supra* note 204.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* *See also* Associated Press, *Factcheck: Trump and Spicer’s Statements on Inaugural Crowd Size*, VOA (Jan. 21, 2017, 9:42 PM), <http://www.voanews.com/a/factcheck-size-of-trump-inaugural-crowd/3686759.html>.

<sup>214</sup> *See* Spicer, *supra* note 204.

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mistake and apologized,<sup>215</sup> but Spicer called the error “egregious” and “irresponsible and reckless.”<sup>216</sup>

Spicer went on to say, “There’s been a lot of talk in the media about the responsibility to hold Donald Trump accountable. And I’m here to tell you that it goes two ways. We’re going to hold the press accountable, as well.”<sup>217</sup> Spicer took no questions and ended the session five minutes after it began.<sup>218</sup>

The White House encounter with the press generated a number of theories. Once again, many in the press were shocked.<sup>219</sup> A press secretary usually strives to be credible,<sup>220</sup> not to insist on a falsehood. The AP ran a factcheck of Spicer’s remarks.<sup>221</sup> Voice of America, the federal government’s own overseas news operation, ran the AP story.<sup>222</sup> From a negotiation standpoint, the session could have been characterized in several ways, and there were many theories. It could have been aimed at anchoring the negotiation, taunting the other side, testing the other side, devaluing the other side’s offer, changing the ground rules, or some combination, as described briefly below.

### a. *Anchoring*

Anchoring attempts to influence the expectations of the other party about the range of possible agreement. The White House may have been trying to set the standard for how much information, good will, and cooperation the press could expect from the administration. After this session, any acknowledgement of a fact would be an improvement. One reporter tweeted in amazement, “Jaw meet floor.”<sup>223</sup>

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<sup>215</sup> Nancy Gibbs, *A Note to Our Readers*, TIME (Jan. 24, 2017), <http://time.com/4645541/donald-trump-white-house-oval-office/>.

<sup>216</sup> See Spicer, *supra* note 204.

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> See, e.g., Sydney Ember & Michael M. Grynbaum, *News Media, Target of Trump’s Declaration of War, Expresses Alarm*, N.Y. TIMES (Jan. 22, 2017), <https://www.nytimes.com/2017/01/22/business/media/sean-spicer-donald-trump-alternative-facts.html>.

<sup>220</sup> KUMAR, *supra* note 27, at 179.

<sup>221</sup> Associated Press, *supra* note 213.

<sup>222</sup> *Id.* (including the president’s own accusation at the Central Intelligence Agency headquarters, that the press had lied about crowd size and concluding, “Trump is wrong”).

<sup>223</sup> Glenn Thrush (@GlennThrush), TWITTER (Jan. 21, 2017, 2:42 PM), <https://twitter.com/glennthrush/status/822937366721654784?lang=en>.



### b. *Testing the Press*

Crowd size was a trivial fact, and the White House numbers were easily disproved. No harm could be done by sending out this strange message, so the message may have been a test of media reaction. The Breitbart website, formerly run by White House chief strategist Steve Bannon, accepted the erroneous Spicer view as though it were a fact.<sup>224</sup>

### c. *Taunting the Press*

The press secretary's language, referring to "egregious errors," expanded on Trump's attack on CNN and extended to the press more broadly. It seemed to pull all reporters away from the sidelines and into the political fray.<sup>225</sup> Accusations pose a dilemma for a journalist,<sup>226</sup> who must choose between self-defense and silence.<sup>227</sup> Self-defense draws the reporter into the battle and erodes the detached stance of journalism. Silence may create an appearance of guilt.<sup>228</sup>

### d. *Changing the Ground Rules*

To say that the White House will hold the press accountable is to miscast the press-president relationship. The White House has organizational power but no authority over the press. The press has only the power of public opinion. The warning may have intended to draw fire. The *Wall Street Journal* said that the opening chapter "suggests this is an administration that will be

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<sup>224</sup> Adelle Nazarian, *WH Press Secretary Sean Spicer Blasts Media's 'Deliberately False Reporting'*, BREITBART (Jan. 21, 2017), <http://www.breitbart.com/live/womens-march-washington-live-updates/wh-press-secretary-sean-spicer-blasts-medias-deliberately-false-reporting/> ("Spicer further noted that the media had attempted to paint Trump's inauguration as appearing much smaller than President Barack Obama's." (emphasis added)).

<sup>225</sup> See Nicholas Fandos, *White House Pushes 'Alternative Facts.' Here are the Real Ones.*, N.Y. TIMES (Jan. 22, 2017), <https://www.nytimes.com/2017/01/22/us/politics/president-trump-inauguration-crowd-white-house.html>.

<sup>226</sup> CLAYMAN & HERITAGE, *supra* note 8, at 143.

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

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defined as much by the fights it wages as the specific initiatives it pushes.”<sup>229</sup> The newspaper quotes Newt Gingrich: “He’s not a conservative but he may be the most effective anti-left politician of our lifetime . . . . He’s going to pick fights the left will find irresistible.”<sup>230</sup>

### e. *Devaluing the Offer*

Facts are the media’s currency, and what the press offers the president is verification and factual acknowledgement. The new president apparently expected that acknowledgement from the inauguration coverage, but he found only disappointing stories. To respond the next day with a bald-faced insistence on his own view might have been a childish refusal to acknowledge reality. Worse, it might have been a narcissistic delusion. Professor Jay Rosen, longtime advocate for a media of civic engagement, had an even more unnerving interpretation.<sup>231</sup> Rosen said the White House meant to devalue facts themselves, and in doing so to cut society loose from reality.<sup>232</sup> He said the Administration’s message to the press was: “You will be turned into hate objects whenever we feel like it . . . . We are not bound by what you call facts.”<sup>233</sup>

### f. *Misdirecting Press Attention*

Spicer’s statement from the Briefing Room came soon after hundreds of thousands of people had participated in a “Women’s March” on the National Mall. News organizations had extensively reported on the marches and related demonstrations in other cities. Some in the media suggested that a fuss in the Briefing Room might be an attempt at misdirection.<sup>234</sup>

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<sup>229</sup> Gerald F. Seib, *Donald Trump Wastes No Time Going to Battle*, WALL ST. J. (Jan. 23, 2017, 3:09 PM), <https://www.wsj.com/articles/donald-trump-wastes-no-time-going-to-battle-1485187689>.

<sup>230</sup> *Id.*

<sup>231</sup> Jay Rosen, *Send the Interns*, PRESSTHINK (Jan. 22, 2017, 7:26 PM), <http://pressthink.org/2017/01/send-the-interns/>.

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> Hadas Gold, *Trump’s Media Relations Get Rocky Quickly*, POLITICO (Jan. 21, 2017, 8:16 PM), <http://www.politico.com/story/2017/01/trump-media-relations-233981>.

## 4. JANUARY 23–25: DEFUSING TENSION

Humor can defuse tension in a negotiation, and Sean Spicer used it at several points in the first, official on-camera White House press briefing. He made two other kinds of moves: he held to his two earlier claims of inaccurate reporting, but shifted focus to the one claim that had a factual basis. Finally, he changed the rules of the Briefing Room with both a symbolic and a substantive alteration.

a. *Defusing Tension*

Humor appeared to be a natural response to the tension that had characterized the Saturday meeting. Spicer began with a self-deprecating joke about his likely unpopularity in the room.<sup>235</sup> Later, he would even joke about the conflict over crowd size.<sup>236</sup> The shift in tone appeared to liven the mood.<sup>237</sup> The *New York Times* reporter Glenn Thrush was reassured: “On Saturday, Spicer’s attitude signaled that it would be impossible for the press to cover the White House. Those fears were allayed somewhat today.”<sup>238</sup>

b. *Shifting Focus*

Asked about his erroneous numbers from Saturday, Spicer said that he had received inaccurate information regarding crowd size and that his claim of a historic audience for the inauguration had included television and Internet viewers.<sup>239</sup> He moved to the erroneous report that Trump had moved the bust of Martin Luther King, Jr. from the Oval Office: “Where was the apology to the President of the United States?”<sup>240</sup> The *New York Times* reporters, commenting online as the briefing was under way, found the public airing of

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<sup>235</sup> Julie Hirschfield Davis, *Video and Analysis from the First Press Briefing of the Trump White House*, N.Y. TIMES (Jan. 23, 2017, 12:59 PM), <https://www.nytimes.com/interactive/2017/01/23/us/politics/spicer-white-house-briefing-live.html>.

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> *Id.* at 3:06 PM.

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

that complaint unusual but likely successful in gaining public sympathy.<sup>241</sup> Reporter Maggie Haberman concluded that White House coverage was going to be asymmetrical: “Any mistake by the press, no matter how quickly it’s addressed, will be amplified to Trump’s supporters, even as the press secretary makes untrue statements.”<sup>242</sup>

c. *Changing Rules*

Rather than following tradition and giving the first question to the AP reporter—or anyone in the first row of media seats—Spicer began in Row 5, with the *New York Post*,<sup>243</sup> and he took his second question from the Christian Broadcasting Network.<sup>244</sup> The *New York Times* correspondent Peter Baker remarked online that spreading questions around in the room would make briefings better.<sup>245</sup> The *Columbia Journalism Review* analyzed transcripts and videos from two weeks of briefings and found that the mainstream media got a chance to ask questions at every briefing, sometimes the first question.<sup>246</sup> Still, some reporters in the Briefing Room were furious.<sup>247</sup> Spicer’s move was more than symbolic. It rejected a measure of control that the press corps had long held. First, it ignored the journalists’ own earned pecking order.<sup>248</sup> Second, it took away their control over the length of the briefing. Traditionally, the senior wire service reporter not only asked the first question but also decided when to end the briefing by saying, “Thank you.”<sup>249</sup> Instead, after taking questions for nearly an hour and twenty minutes, Spicer ended the briefing himself.<sup>250</sup> In another move, Spicer further undermined press control

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<sup>241</sup> *Id.* at 2:55 PM. (N.Y. Times reporter Peter Baker writes “[M]uch of this is the normal back and forth. But normally presidents and their aides litigate the coverage behind closed doors, yelling at reporters but not taking the fight public.”).

<sup>242</sup> *Id.* at 2:24 PM.

<sup>243</sup> The New York City tabloid is owned by Rupert Murdoch, who also owns the *Wall Street Journal* and Fox News.

<sup>244</sup> Davis, *supra* note 235.

<sup>245</sup> *Id.* at 1:57 PM.

<sup>246</sup> Carlett Spike & Pete Vernon, *We Analyzed Two Weeks of Spicer Press Briefings. Here’s What We Learned*, COLUM. JOURNALISM REV. (Feb. 24, 2017) <https://www.cjr.org/analysis/spicer-briefings-press-skype-questions-mainstream-trump.php>.

<sup>247</sup> E-mail from Mark Smith to Carol Pauli, *supra* note 40, at ¶ 3.

<sup>248</sup> The White House Correspondents’ Association assigns seats to news organizations based on factors such as audience size, history, and investment in covering the White House. *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> Davis, *supra* note 235.

when he announced the addition of four “Skype seats” to the Briefing Room to allow participation by reporters outside of Washington.<sup>251</sup>

In the past, established members of the press corps had welcomed new reporters. For example, the first blogger to get White House press credentials, in 2005, did so with help from *USA Today* and CNN.<sup>252</sup> What reporters criticized during that same year was something else: the inclusion of a non-reporter who got credentials from the Bush administration and then asked questions that were favorable to the administration.<sup>253</sup> In 2017, in light of earlier broadcast comments by Gingrich and others on Fox News,<sup>254</sup> Trump’s addition of local reporters could have been a potential threat—a way to bring in the friendlier questions typical of local news outlets<sup>255</sup> as well as to bypass the national press by “narrowcasting” the White House message to future election battleground states.<sup>256</sup>

Shifts in the Briefing Room were related to a further change beyond it: the coming of age of a “discrete and relatively insular right-wing media ecosystem,” which had been forming.<sup>257</sup> It had radicalized the right, hollowing out the political center-right.<sup>258</sup> In place of conservative outlets like the *National Review*, the most prominent in this new system were Fox News and Breitbart News,<sup>259</sup> the latter self-described as a “platform for the alt-right.”<sup>260</sup>

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<sup>251</sup> *Id.* at 1:54 PM.

<sup>252</sup> Katharine Q. Seelye, *Media; White House Approves Pass for Blogger*, N.Y. TIMES (Mar. 7, 2005), [http://www.nytimes.com/2005/03/07/washington/media-white-house-approves-pass-for-blogger.html?\\_r=1](http://www.nytimes.com/2005/03/07/washington/media-white-house-approves-pass-for-blogger.html?_r=1) (Blogger Garrett M. Graff, 23, who wrote a blog called FishbowlDC about the news media in Washington).

<sup>253</sup> *N.Y. Times Finally Covers White House Press Pass Episode*, SIMPLY APPALLING (Mar. 8, 2005), <http://simplyappalling.blogspot.com/2005/03/ny-times-finally-covers-white-house.html>.

<sup>254</sup> Alana Horowitz Satin, *Sean Hannity’s Attacks on Journalists Sink to New Low*, HUFFINGTON POST (Nov. 24, 2016, 10:00 AM), [http://www.huffingtonpost.com/entry/sean-hanity-journalists\\_us\\_5836d954e4b09b605600418a](http://www.huffingtonpost.com/entry/sean-hanity-journalists_us_5836d954e4b09b605600418a) (quoting commentator Sean Hannity as asking, “Why should CNN have a seat in the White House press room? Why should NBC have a seat there? Why should the *New York Times* have a seat there, or Politico? They all think they’re journalists, they’re all full of crap, and they’ve all been exposed.”).

<sup>255</sup> IYENGAR, *supra* note 13, at 211.

<sup>256</sup> IYENGAR, *supra* note 13, at 210–11; *see also* GRABER & DUNAWAY, *supra* note 35, at 184.

<sup>257</sup> Faris, *supra* note 155, at 17.

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

<sup>260</sup> Sarah Posner, *How Donald Trump’s New Campaign Chief Created an Online Haven for White Nationalists*, MOTHER JONES (Aug. 22, 2016, 10:00 AM),

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The practices of many in this new ecosystem were unlike those of the traditional press.<sup>261</sup> Among those to get credentials from the White House was a writer for the provocative pro-Trump blog, Gateway Pundit.<sup>262</sup> He understood his job as being to “troll the press corps.”<sup>263</sup>

### 5. FEBRUARY 16: REWARDING AND PUNISHING

Three weeks into his presidency, Trump’s first news conference, in the White House East Room, offered a look at the way he would deal first-hand with the assembled press corps. He had written in his autobiography about trying to “be straight” with reporters.<sup>264</sup> “I try not to deceive them or to be defensive, because those are precisely the ways most people get themselves into trouble with the press.”<sup>265</sup> The president spent twenty-three minutes making announcements and strikingly questionable statements about his election victory (“I guess it was the biggest Electoral College win since Ronald Reagan.”<sup>266</sup>) and his administration’s progress (“This administration is running like a fine-tuned machine.”<sup>267</sup>).

His opening remarks returned several times to the press, specifically criticizing the news outlets in Washington, D.C., New York, and Los Angeles as dishonest and “out of control.”<sup>268</sup> Then he spent nearly an hour answering questions, starting in the middle of the second row with a sympathetic nod to NPR White House correspondent Mara Liason, who had been interrupted by

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<https://www.motherjones.com/politics/2016/08/stephen-bannon-donald-trump-alt-right-breitbart-news/> (quoting former Breitbart chairman Stephen Bannon).

<sup>261</sup> Faris, *supra* note 155, at 17.

<sup>262</sup> Michael M. Grynbaum, *A Pro-Trump Blog Gains White House Credentials*, N.Y. TIMES, Feb. 14, 2017 at A18, available as *White House Grants Press Credentials to a Pro-Trump Blog*, <https://www.nytimes.com/2017/02/13/business/the-gateway-pundit-trump.html>.

<sup>263</sup> Andrew Marantz, *Trolling the White House Press Corps*, NEW YORKER, March 20, 2017, available as *Is Trump Trolling the Press Corps?*, <http://www.newyorker.com/magazine/2017/03/20/is-trump-trolling-the-white-house-press-corps>.

<sup>264</sup> Trump, *supra* note 1, at 57–58.

<sup>265</sup> *Id.*

<sup>266</sup> Donald J. Trump, *Remarks by President Trump in Press Conference*, THE WHITE HOUSE (Feb. 16, 2017, 12:55 PM), <https://www.whitehouse.gov/the-press-office/2017/02/16/remarks-president-trump-press-conference>.

<sup>267</sup> *Id.*

<sup>268</sup> *Id.*

a colleague the day before: “Mara. Mara, go ahead. You were cut off pretty violently at our last news conference.”<sup>269</sup>

The first questions focused on reports of contacts between the Putin regime and the President’s campaign. Trump expressed frustration at leaks to the news media that had revealed the content of his phone calls to the leaders of Mexico and Australia: “All of a sudden people are finding out exactly what took place . . . . [H]ow does the press get this information that’s classified? How do they do it? You know why? Because it’s an illegal process, and the press should be ashamed of themselves.”<sup>270</sup> He criticized other stories that he said were false, including front page stories in the “failing New York Times” and the *Wall Street Journal*. Then he expressed his enthusiasm for fighting, saying, “I’ll be honest—because I sort of enjoy this back and forth, and I guess I have all my life.”<sup>271</sup> The next skirmish was with a reporter who challenged Trump’s Electoral College numbers. It ended with the president reversing the question-answer protocol:

**Q** You said today that you had the biggest electoral margins since Ronald Reagan with 304 or 306 electoral votes. In fact, President Obama got 365 in 2008.

**THE PRESIDENT:** Well, I’m talking about Republican. Yes.

**Q** President Obama, 332. George H.W. Bush, 426 when he won as President. So why should Americans trust—

**THE PRESIDENT:** Well, no, I was told—I was given that information. I don’t know. I was just given. We had a very, very big margin.

**Q** I guess my question is, why should Americans trust you when you have accused the information they receive of being fake when you’re providing information that’s fake?

**THE PRESIDENT:** Well, I don’t know. I was given that information. I was given—actually, I’ve seen that information around. But it was a very substantial victory. Do you agree with that?

**Q** You’re the President.

**THE PRESIDENT:** Okay, thank you. That’s a good answer. Yes.<sup>272</sup>

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<sup>269</sup> *Id.*

<sup>270</sup> *Id.*

<sup>271</sup> *Id.*

<sup>272</sup> *Id.*

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Having seized the reporter’s role of asking the question and judging the answer, the President went on to judge the reporters:

There is nobody I have more respect for—well, maybe a little bit— than reporters, than good reporters. It’s very important to me, and especially in this position. It’s very important. I don’t mind bad stories. I can handle a bad story better than anybody as long as it’s true. And over a course of time, I’ll make mistakes and you’ll write badly and I’m okay with that. But I’m not okay when it is fake.<sup>273</sup>

During the rest of the session, at least five reporters found their news outlets or their questions evaluated for friendliness. This process followed a comment from CNN’s Jim Acosta, who volunteered to the president, “[J]ust for the record, we don’t hate you, I don’t hate you.”<sup>274</sup> It continued when the president took a question from the BBC:

**THE PRESIDENT:** Where are you from?

**Q** BBC.

**THE PRESIDENT:** Okay. Here’s another beauty.

**Q** That’s a good line. Impartial, free, and fair.

**THE PRESIDENT:** Yeah, sure.

**Q** Mr. President—

**THE PRESIDENT:** Just like CNN, right?<sup>275</sup>

Then he turned to a male reporter wearing a yarmulke, saying, “I want to find a friendly reporter. Are you a friendly reporter? Watch how friendly he is. Wait, wait—watch how friendly he is. Go ahead. Go ahead.”<sup>276</sup> The question concerned anti-Semitism. Trump resented it and made that clear:

**THE PRESIDENT:** You see, he said he was going to ask a very simple, easy question. And it’s not. It’s not. Not a simple

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<sup>273</sup> *Id.*

<sup>274</sup> Cynthia Littleton, *Jeff Zucker: President Trump’s Attacks Haven’t Hurt CNN’s Brand*, VARIETY (Feb. 16, 2017), <http://variety.com/2017/tv/news/cnn-jeff-zucker-trump-attacks-turner-1201990324/> (quoting CNN president Jeff Zucker as citing a 51 percent increase in viewership over the previous year, and also noting that Zucker headed NBC when Trump began his “The Apprentice” show on that network).

<sup>275</sup> Trump, *supra* note 266.

<sup>276</sup> *Id.*



question, not a fair question. Okay, sit down. I understand the rest of your question . . . .

**Q** (Inaudible.)

**THE PRESIDENT:** Quiet, quiet, quiet. See, he lied about—he was going to get up and ask a very straight, simple question. So you know, welcome to the world of the media . . . So you should take that, instead of having to get up and ask a very insulting question like that . . . . See, it just shows you about the press, but that's the way the press is.<sup>277</sup>

Another reporter won presidential praise for a question about the first lady's plan to open the White House Visitors Office. Trump said, "Now, that's what I call a nice question. That is very nice. Who are you with? . . . I'm going to start watching. Thank you very much."<sup>278</sup> Then he turned warily to an African-American reporter in the third row, April Ryan, White House correspondent and Washington bureau chief for American Urban Radio.

**THE PRESIDENT:** Oh, this is going to be a bad question but that's okay.

**Q** No, it's not going to be a bad question.

**THE PRESIDENT:** Good, because I enjoy watching you on television.

**Q** Well, thank you so much. Mr. President, I need to find out from you—you said something as it relates to inner cities. That was one of your platforms during your campaign.

**THE PRESIDENT:** Fix the inner cities, yes.

**Q** Fixing the inner cities. What will be that fix and your urban agenda, as well as your HBCU executive order that's coming out this afternoon? See, it wasn't bad, was it?

**THE PRESIDENT:** That was very professional and very good.

**Q** I'm very professional.<sup>279</sup>

## 6. FEBRUARY 17: MAKING ENEMIES

If reporters worried that the President could manipulate them with his approval, they did not need to worry long. Name-calling followed the next

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<sup>277</sup> *Id.*

<sup>278</sup> *Id.*

<sup>279</sup> *Id.*

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day. In a tweet from Mar-a-Lago, the President said “The FAKE NEWS media (failing @nytimes, @NBCNews, @ABC, @CBS, @CNN) is not my enemy, it is the enemy of the American People!”<sup>280</sup> He repeated the remark a week later when addressing the Conservative Political Action Conference on February 24.

A few days ago, I called the fake news “the enemy of the people”—and they are. They are the enemy of the people. Because they have no sources, they just make them up when there are none . . . . They are very dishonest people . . . . I’m not against the press. I don’t mind bad stories if I deserve them.”<sup>281</sup>

The phrase “enemy of the people” drew immediate reactions from the news media. The *New York Times*, calling it “a striking escalation” in Trump’s attacks on the press,<sup>282</sup> reported that Soviet leader Nikita Khrushchev had once denounced the phrase because Stalin had used it to target his critics for annihilation.”<sup>283</sup>

### 7. FEBRUARY 24: CLOSING THE DOOR

White House press interactions take several forms. A “gaggle” is a brief, informal, off-camera talk between reporters and the White House press secretary.<sup>284</sup> Some press secretaries have used it to bring reporters into their office, outline the president’s schedule, and begin relaying the day’s intended message from the White House.<sup>285</sup> This was the practice under the administration of President Bill Clinton and, initially, under President George

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<sup>280</sup> Michael M. Grynbaum, *Trump Calls the News Media the ‘Enemy of the American People’*, N.Y. TIMES, Feb. 17, 2007, at A15.

<sup>281</sup> Donald J. Trump, *Remarks by President Trump at the Conservative Political Action Conference*, WHITE HOUSE (Feb. 24, 2017), <https://www.whitehouse.gov/the-press-office/2017/02/24/remarks-president-trump-conservative-political-action-conference>.

<sup>282</sup> Grynbaum, *supra* note 280, at A15.

<sup>283</sup> Andrew Higgins, *Phrase with a Venomous Past Now Rattles American Politics*, N.Y. TIMES, Feb. 26, 2017, at A1, available as *Trump Embraces ‘Enemy of the People,’ a Phrase with a Fraught History*, [https://www.nytimes.com/2017/02/26/world/europe/trump-enemy-of-the-people-stalin.html?\\_r=0](https://www.nytimes.com/2017/02/26/world/europe/trump-enemy-of-the-people-stalin.html?_r=0).

<sup>284</sup> KUMAR, *supra* note 27, at 223–24 (yes, the term comes from the sound of squawking geese).

<sup>285</sup> *Id.* at 217.

W. Bush.<sup>286</sup> With the start of the Iraq War in 2003, press secretary Ari Fleischer found his office too crowded with reporters, so he moved gaggles to the more spacious Briefing Room, where they gradually resembled a pre-run of the on-camera afternoon briefing.<sup>287</sup>

A “pool” is used when the number of reporters at an event must be limited due to security or logistical concerns. The group of pool reporters is selected in advance by rotation.<sup>288</sup> They are drawn from print, radio, television, and magazine outlets.<sup>289</sup> They represent the other news organizations and share their reports with those who cannot be present, so no news outlets are frozen out.<sup>290</sup> But that rare sanction of freezing out<sup>291</sup> appeared to be exactly what happened on February 24, 2017, when Sean Spicer moved the morning gaggle out of the Briefing Room and into to his office in the West Wing. At the office door, White House staffers admitted a number of news outlets, including the conservative Breitbart, Fox News, One America News Network, and the *Washington Times*.<sup>292</sup> But the staffers barred CNN, the *New York Times*, the *Los Angeles Times*, Politico, and BuzzFeed.<sup>293</sup> The White House explained that the gathering was a “pool” event, to which “a couple more reporters” had been added.<sup>294</sup> But the arrangement followed the ground rules of neither pool nor gaggle.<sup>295</sup>

#### a. *Dividing the Press*

It is possible that the White House intention was to drive a wedge in the press corps between favorable and critical reporters. Instead, the move

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<sup>286</sup> E-mail from Mark Smith to Carol Pauli, *supra* note 40, at ¶ 1.

<sup>287</sup> *Id.* (adding that under President Obama, press secretary Robert Gibbs did away with gaggles except to conduct one with the travel pool, often at the back of Air Force One, on days when the president was traveling and the White House, therefore, held no formal press briefing).

<sup>288</sup> KUMAR, *supra* note 27, at 251–52.

<sup>289</sup> *Id.*

<sup>290</sup> *Id.*

<sup>291</sup> COOK, *supra* note 4, at 134.

<sup>292</sup> Callum Borchers, *White House Blocks CNN, New York Times from Press Briefing Hours After Trump Slams Media*, WASH. POST (Feb. 24, 2017), <https://www.washingtonpost.com/news/the-fix/wp/2017/02/24/white-house-blocks-cnn-new-york-times-from-press-briefing-hours-after-trump-slams-media/>.

<sup>293</sup> *Id.*

<sup>294</sup> *Id.*

<sup>295</sup> *Id.* (quoting CNN reporter Sara Murray as saying, “Now, normally, if you were going to do something like this—an extended gaggle, off camera—you would have one person from each news outlet . . . . That is not what the White House was doing today.”).

united the major news organizations, as had a similar move some eight years before, when President Obama questioned whether Fox News was legitimate. At that time, other media outlets protested in solidarity, one declaring Fox a “sister organization.”<sup>296</sup> Now Fox News stepped up to say that no journalists should be delegitimized by the White House.<sup>297</sup> The AP and *Time Magazine* reporters boycotted the gaggle.<sup>298</sup> Others pledged to do the same if the tactic were repeated.<sup>299</sup> The *Washington Post* said that the administration was on “an undemocratic path.”<sup>300</sup> The White House Correspondents Association registered its displeasure.<sup>301</sup>

## 8. AND AFTERWARD

In his first hundred days, the President sent a total of at least 476 tweets.<sup>302</sup> These short bursts of communication accomplished at least three things at once. First, they allowed him to speak directly to his followers. Second, they drew the attention of the press, which amplified his message and kept his name in the news.<sup>303</sup> Third, the content of the tweets was often criticism of his political opponents and the press; his most commonly used words and phrases were “democrat,” “fake news,” and “media.”<sup>304</sup> His Twitter account amounted to “a bully pulpit, propaganda weapon and attention magnet all rolled into one.”<sup>305</sup>

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<sup>296</sup> Jim Rutenberg, *Outgunned, Outmaneuvered and in Need of a Game Plan*, N.Y. TIMES, Jan. 12, 2017, at A13, available as *As Trump Berates News Media, a New Strategy is Needed to Cover Him*, <https://www.nytimes.com/2017/01/12/business/media/trump-media-news-conference.html>.

<sup>297</sup> *Id.*

<sup>298</sup> Lukas Alpert, *Some Media Outlets Excluded from White House Briefing; Move Illustrates Strained Relations Between Trump Administration and Press*, WALL ST. J. (Feb. 24, 2017), <https://www.wsj.com/articles/some-media-outlets-excluded-from-white-house-briefing-1487971648>.

<sup>299</sup> *Id.*

<sup>300</sup> Rutenberg, *supra* note 296.

<sup>301</sup> *Id.*

<sup>302</sup> Adam Kelsey, *Analysis: Facts and Figures Behind 100 Days of President Trump's Tweets*, ABC NEWS (Apr. 30, 2017), <http://abcnews.go.com/Politics/analysis-facts-figures-99-days-president-trumptweets/story?id=47066146>.

<sup>303</sup> Michael M. Grynbaum & Sydney Ember, *If Trump Tweets It, Is It Always News? A Quandary for the News Media*, N.Y. TIMES (Nov. 30, 2016), <https://www.nytimes.com/2016/11/29/business/media/if-trump-tweets-it-is-it-news-a-quandary-for-the-news-media.html>.

<sup>304</sup> Kelsey, *supra* note 302.

<sup>305</sup> Grynbaum & Ember, *supra* note 303.

During the rest of the President's first year in office, the faces in the Briefing Room changed on both sides of the podium. Most notably, six months into the new administration, Press Secretary Sean Spicer resigned when the President hired Anthony Scaramucci as communications director.<sup>306</sup> The blunt-talking New York financier, nicknamed "The Mooch," then made unguarded, profane statements to the *New Yorker* magazine,<sup>307</sup> prompting the White House to fire him after just ten days on the job and replace him with former deputy press secretary Sarah Huckabee Sanders.<sup>308</sup> On the press side of the room by the end of the year, the *New York Times* correspondent Glenn Thrush had been removed after the *Times* investigated allegations that he had engaged in offensive behavior with women journalists.<sup>309</sup>

A standoff continued, however. Any White House reporters who had considered boycotting press briefings found that the President had effectively beat them to it. After his one long news conference at the start of his administration, the President set a record by not having another solo, in-person appearance for the rest of his first year.<sup>310</sup> (He held dozens of joint news conferences with other world leaders, however.<sup>311</sup>) Furthermore, he not only continued his characterizing of the media as false, but he decided to give out "fake news awards." He tweeted out a link to the Republican National

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<sup>306</sup> Ashley Parker, Abby Phillip & Damian Paletta, *At the White House, an Abrupt Chain Reaction: Spicer Out; Scaramucci and Sanders In*, WASH. POST (Jul. 21, 2017), [https://www.washingtonpost.com/politics/at-the-white-house-spicer-out-scaramucci-sanders--and-chaos--in/2017/07/21/faladd18-6e43-11e7-b9e2-2056e768a7e5\\_story.html?utm\\_term=.8416ee6518b6](https://www.washingtonpost.com/politics/at-the-white-house-spicer-out-scaramucci-sanders--and-chaos--in/2017/07/21/faladd18-6e43-11e7-b9e2-2056e768a7e5_story.html?utm_term=.8416ee6518b6).

<sup>307</sup> Ryan Lizza, *Anthony Scaramucci Called Me to Unload About White House Leakers, Reince Priebus, and Steve Bannon*, NEW YORKER (Jul. 25, 2017), <https://www.newyorker.com/news/ryan-lizza/anthony-scaramucci-called-me-to-unload-about-white-house-leakers-reince-priebus-and-steve-bannon>.

<sup>308</sup> Abby Phillip & Damian Paletta, *Anthony Scaramucci Removed as White House Communications Director*, WASH. POST (Jul. 31, 2017), [https://www.washingtonpost.com/news/post-politics/wp/2017/07/31/anthony-scaramucci-removed-as-white-house-communications-director/?utm\\_term=.5b6211378c8d](https://www.washingtonpost.com/news/post-politics/wp/2017/07/31/anthony-scaramucci-removed-as-white-house-communications-director/?utm_term=.5b6211378c8d).

<sup>309</sup> Sydney Ember, *Suspended Times Reporter Will Resume Work but Won't Cover White House*, N.Y. TIMES, Dec. 21, 2017, at B7.

<sup>310</sup> Chris Cillizza, *It's Been a Full Year Since Donald Trump Last Held a News Conference*, CNN POLITICS (Feb. 16, 2018), <https://www.cnn.com/2018/02/16/politics/donald-trump-press-conference-analysis/index.html>.

<sup>311</sup> *Presidential News Conferences: Coolidge-Trump*, THE AMERICAN PRESIDENCY PROJECT (Feb. 22, 2017), <http://www.presidency.ucsb.edu/data/newsconferences.php>.

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Committee website, which displayed a list of eleven stories by the *New York Times*, the *Washington Post*, ABC, CNN, *Time*, and *Newsweek*.<sup>312</sup>

Mainstream news outlets criticized—and carried—the story, prompting *Columbia Journalism Review* editor Kyle Pope to critique their willingness “to give Trump oxygen” for the awards.<sup>313</sup> He said the field had failed to maintain the vision it had tried to articulate at the start of the administration:

The idea then was that it was time to take the story back . . . . We were going to decide what mattered, how our audience spent their time. In the months since, Trump has done his thing, taunting and lying and promising lawsuits and legislation and more threats. We, unfortunately, have failed to hold up our end of the bargain . . . . How do we retake the agenda from this man who so hungers for attention, and how do we tell stories in a way that reflects the scale and sweep of the moment we’re in?<sup>314</sup>

The next section offers a response to Pope’s question, on the theory that one of the best ways to think through a difficult problem is to generate observations in the form of advice.<sup>315</sup> This requires choosing a party who is in a position to do something and then thinking through what this party might do.<sup>316</sup> So here, that party is the White House press corps.

### IV. ADVICE FOR REPORTERS

The opening signals to the press from the Trump White House were confusing. The president both praised and condemned the *New York Times*, for example. He prompted an assortment of reporters to reassure him of their friendly intentions during a news conference but then denounced some of them the next day as the “enemy of the people.” His staff repeated verifiably false information but attacked a reporter’s acknowledged mistake as “egregious.”

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<sup>312</sup> *The Highly-Anticipated 2017 Fake News Awards*, GOP (Jan. 17, 2018), <https://www.gop.com/the-highly-anticipated-2017-fake-news-awards/>.

<sup>313</sup> Kyle Pope, *It’s Time to Rethink How We Cover Trump*, COLUM. JOURNALISM REV. (Jan. 22, 2018), [https://www.cjr.org/covering\\_trump/trump-coverage-inauguration-press-media.php](https://www.cjr.org/covering_trump/trump-coverage-inauguration-press-media.php).

<sup>314</sup> *Id.*

<sup>315</sup> ROGER FISHER, ELIZABETH KOPELMAN & ANDREA KUPFER SCHNEIDER, *BEYOND MACHIAVELLI: TOOLS FOR COPING WITH CONFLICT* 7 (1994).

<sup>316</sup> *Id.* at 10–11.

Such contradiction may be a sign of confusion on the part of the president, or it may be a strategy, a way to veil a threat.<sup>317</sup> What follow are four broad categories of advice from negotiation theory: articulate goals, prepare a strategy, avoid traps, and strengthen the press BATNA.

### A. *Articulate Goals*

A wise negotiator begins by identifying a goal or “target point”<sup>318</sup> so that he or she can bargain with a purpose and not merely react to the moves of the other party.<sup>319</sup> The goal should be lofty and expansive because high aspirations produce the best results.<sup>320</sup> This is especially true where a negotiator is at risk of being intimidated by the other party.<sup>321</sup> Ideally, the goal should not depend entirely on the cooperation of the other party.<sup>322</sup> Success can be guaranteed if the goal can be achieved without the cooperation of the other party.<sup>323</sup>

What the lofty, aspirational goal of the press should be at the White House depends on one’s theory of democracy. Elitist democracy needs a press that covers the issues that are dividing the establishment powers.<sup>324</sup> Liberal pluralism needs a press that helps interest groups develop and argue for their views.<sup>325</sup> Republican democracy needs a press that facilitates rational conversations so people can work together for the common good.<sup>326</sup> Professor C. Edwin Baker found that the United States, a complex democracy, demands all three press roles.<sup>327</sup> Furthermore, he found that two press functions remain constant no matter which view one has of democracy: the press must provide information to the public, and it must serve as a check on government power.<sup>328</sup>

The White House press corps already addresses those two shared core goals. Its members combine to amass information as part of a check on

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<sup>317</sup> H. PEYTON YOUNG, *NEGOTIATION ANALYSIS* 96 (1991) (pointing to President Eisenhower’s use of inconsistent messages to the Soviet Union to send a veiled threat that the United States might be willing to fight over Berlin).

<sup>318</sup> Adler & Silverstein, *supra* note 57, at 64.

<sup>319</sup> FISHER, KOPELMAN & SCHNEIDER, *supra* note 315, at 12.

<sup>320</sup> Adler & Silverstein, *supra* note 57, at 64.

<sup>321</sup> *Id.*

<sup>322</sup> FISHER, KOPELMAN & SCHNEIDER, *supra* note 315, at 16.

<sup>323</sup> *Id.*

<sup>324</sup> Baker, *supra* note 18, at 326.

<sup>325</sup> Baker, *supra* note 18, at 336.

<sup>326</sup> *Id.*

<sup>327</sup> *Id.*

<sup>328</sup> *Id.* at 408.

government power, taking aim at different policies from different political vantage points.<sup>329</sup> In addition, they serve a wide range of competing goals. Some news outlets report primarily to the elite establishment. Some cater to smaller interest groups. Others strive to support conversations that help to define the common good. What more is needed?

Each democratic theory has its own fears about the things that can go wrong if the press fails in its role, and a complex democracy theory fears them all.<sup>330</sup> For example, elitist democrats fear that the checking role of the press may fall victim to such forces as government manipulation or financial pressure.<sup>331</sup> Liberal pluralists fear a lack of diversity in the media.<sup>332</sup> Republican theory fears that cynicism will lead the public to disengage from civic life, leading to social disintegration.<sup>333</sup>

In laying out its goals, the White House press corps would be wise to ask which facet of democracy is most at risk and which fears are most realistic and important. Fear of censorship and manipulation is one good candidate. As has been shown, the first month of the new administration saw efforts at manipulation when the White House made false statements, publicly denounced specific media outlets, and expressed its approval and disapproval of questions during the Press Briefing. In response, the *New York Times* called for a return to the traditional president-press relationship, adversarial but still based on mutual trust.<sup>334</sup> That is a lofty goal, but it requires the cooperation of the president. As an achievable formulation of that goal, members of the White House press corps could aim to remain impervious to attack and manipulation, while also being scrupulously trustworthy, themselves.

The liberal democratic fear focuses on a lack of diversity in the news media, a perennial concern, especially given decades of media consolidation. The rise of news sites on the Internet and in social media may suggest that liberal pluralism is robust, but many so-called news sites are merely sites of opinion and aggregations of inaccuracies. They practice, at best, the “journalism of affirmation,” designed to appeal emotionally to audiences by

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<sup>329</sup> Cook, *supra* note 51, at 162.

<sup>330</sup> Baker, *supra* note 18, at 383.

<sup>331</sup> *Id.* at 361.

<sup>332</sup> *Id.* at 374.

<sup>333</sup> *Id.* at 365.

<sup>334</sup> Grynbaum & Ember, *supra* note 135 (“[T]he encounter crystallized concerns that Mr. Trump, emboldened by his victory, may refuse to abide the traditional dynamic of a president and the journalists who cover him, a naturally adversarial relationship that is nevertheless based on some level of mutual trust.”).



bolstering their prejudices.<sup>335</sup> As a lofty goal in response to this concern, the White House press corps could support new mechanisms for helping grassroots news organizations uncover information responsive to the needs of their audiences. They could consider ways to distinguish real news organizations from imposters.

Above all, in these politically polarized times the most salient concern for the news media appears to be the republican fear of social disintegration. Writing nearly twenty years ago, Baker warned that people in “self-enclosed media worlds” eventually would not acknowledge any common body of facts.<sup>336</sup> In time, he said, “they will have nothing to say to each other. Any common public sphere will wither and die.”<sup>337</sup> Baker was chronicling a politically polarizing media environment, but journalism scholar Jay Rosen saw the new White House as deliberately taking that trend to a new level. After Sean Spicer’s first encounter with the press, Rosen described a nightmare vision of a United States losing faith in truth, itself.

Rosen saw the press briefing as a signal that the president’s supporters would have to accept falsehoods as the price of their alliance with him and that the clamor of opposing voices would only further highlight false information. He warned that the rest of the public would tire and would give up on separating truth from fiction.<sup>338</sup> Rosen’s fears echoed in a later *Time Magazine* cover story, “Is Truth Dead?”<sup>339</sup> Against such fears, Baker suggested that the press would have to lead the way in engaging audiences in thoughtful discourse.<sup>340</sup> To accomplish such a feat would be another lofty goal. To formulate that goal as an achievable one, White House reporters and their news organizations could aim at fostering civil cross-cutting talk, which would help audiences break out of their limited media worlds.

In conclusion, thinking about the ideal role of the press in covering the White House—and the dangers that may befall it—generates several worthy goals for the press. It can aim at being immune to White House

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<sup>335</sup> BILL KOVACH & TOM ROSENSTIEL, *BLUR: HOW TO KNOW WHAT’S TRUE IN THE AGE OF INFORMATION OVERLOAD* 131 (2010) (“Cherry-picking facts, imputing cartoonish evil motive to people, engaging in ad hominem attacks, and constructing reassuring, closed realities, are only four of the most common techniques used in the journalism of affirmation . . . . The larger point here is that the journalism of affirmation is a form of persuasion, or an appeal to an audience based on ideological loyalty rather than journalistic inquiry.”).

<sup>336</sup> Baker, *supra* note 18, at 366.

<sup>337</sup> *Id.* at 365.

<sup>338</sup> Rosen, *supra* note 231.

<sup>339</sup> Nancy Gibbs, *Is Truth Dead? When a President Can’t Be Taken at His Word*, *TIME* (Mar. 23, 2017), <http://time.com/4710615/donald-trump-truth-falsehoods/>.

<sup>340</sup> Baker, *supra* note 18, at 366.

manipulation. It can aim at maintaining the value of accurate facts in political discourse. It can aim at the inclusion of a wide range of interest groups publishing verifiable facts in the media. Finally, it can aim at reducing political isolation and increasing civil discourse across political divisions. These goals are meant to serve as examples. More, no doubt, could be added by members of the White House press corps. The important thing is to develop and articulate these goals.

### B. *Prepare a Strategy*

Negotiators are universally advised to plan and prepare for bargaining.<sup>341</sup> One important part of planning is to imagine the conflict from the opposite point of view by thinking in the other side’s voice and expressing the other side’s interests.<sup>342</sup> All national leaders are likely to value such interests as maintaining power, protecting reputation, gaining support, setting good precedents, doing the right thing, being consistent, serving constituents, and keeping options open.<sup>343</sup> Generally speaking, in an ideal communication, from the White House point of view, the president would influence the opinion of the nation without interference from skeptics or critics.<sup>344</sup> In considering a particular leader’s interests, no one can read minds, but international negotiators are often able to glean clues from published information.<sup>345</sup> The task is easier when the leader is an American president who has long been in the public eye.

The president’s statements, his longtime celebrity, and his accomplishments in luxury real estate development suggest two interests that color his relationship with the press. First, despite his disdain for the mainstream press, the president has long demonstrated a high interest in its attention and a preoccupation with disapproval. In his first interview after the election, he told CBS News correspondent Lesley Stahl that he attacked the press in order to protect himself from criticism, “so when you write negative stories about me no one will believe you.”<sup>346</sup> Second, he has an interest in

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<sup>341</sup> Adler & Silverstein, *supra* note 57, at 61.

<sup>342</sup> URY, *supra* note 169, at 19.

<sup>343</sup> FISHER, KOPELMAN & SCHNEIDER, *supra* note 315, at 53.

<sup>344</sup> IYENGAR, *supra* note 13, at 203.

<sup>345</sup> FISHER, KOPELMAN & SCHNEIDER, *supra* note 315, at 28.

<sup>346</sup> Eli Rosenberg, *Trump Admitted He Attacks the Press to Shield Himself from Negative Coverage, Lesley Stahl Says*, WASH. POST (May 22, 2018), [https://www.washingtonpost.com/news/the-fix/wp/2018/05/22/trump-admitted-he-attacks-press-to-shield-himself-from-negative-coverage-60-minutes-reporter-says/?utm\\_term=.d28566576325](https://www.washingtonpost.com/news/the-fix/wp/2018/05/22/trump-admitted-he-attacks-press-to-shield-himself-from-negative-coverage-60-minutes-reporter-says/?utm_term=.d28566576325).

projecting grand dreams, unfettered by counter narratives. Projecting lofty visions of the future worked well for him in business and on the campaign trail. He once wrote about this ability to capture the imaginations of others in order to accomplish large projects,

The key to the way I promote is bravado. I play to people's fantasies. People may not always think big themselves, but they can still get very excited by those who do. That's why a little hyperbole never hurts . . . . I call it truthful hyperbole. It's an innocent form of exaggeration—and a very effective form of promotion.<sup>347</sup>

To acknowledge these interests is not to endorse them.<sup>348</sup> But the exercise of spelling out another's interests can help broaden perceptions and even suggest areas of flexibility.<sup>349</sup> Here, these personal interests of the president are fundamentally at odds with the core responsibilities of the journalists who cover him.<sup>350</sup> Yet, they also suggest that his attacks on the press are, beneath the surface, confirmation of its value to him.<sup>351</sup>

Having different interests, and even different worldviews, need not prevent reaching workable arrangements.<sup>352</sup> A negotiation can succeed if the parties can simply meet their interests better together than alone.<sup>353</sup> Even bitter enemies can overcome their distrust and negotiate successfully when doing so is practical.<sup>354</sup> Furthermore, even negotiations that fail to achieve their highest goals may, nonetheless, result in desirable changes. Ury urges negotiators take stock of, not only what they aspire to, but also what they would be reasonably content with and even what they could live with—if grudgingly.<sup>355</sup> As its grudging position, the press might push for ground rules in which the White House would stop such practices as granting credentials to non-reporters and repeatedly prioritizing questions from favorable news organizations.

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<sup>347</sup> Trump, *supra* note 1, at 58.

<sup>348</sup> Campbell & Docherty, *supra* note 108, at 43.

<sup>349</sup> FISHER, KOPELMAN & SCHNEIDER, *supra* note 315, at 25–27.

<sup>350</sup> GRABER & DUNAWAY *supra* note 35, at 19.

<sup>351</sup> Cook, *supra* note 51, at 160.

<sup>352</sup> Campbell & Docherty, *supra* note 108, at 43.

<sup>353</sup> URY, *supra* note 169, at 21.

<sup>354</sup> ROBERT MNOOKIN, BARGAINING WITH THE DEVIL: WHEN TO NEGOTIATE, WHEN TO FIGHT 136 (2010).

<sup>355</sup> URY, *supra* note 169, at 25–26.

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The press corps has some power in dealing with the White House. It has the positive leverage of being able to do something for the president<sup>356</sup> by verifying as facts his statements and actual achievements. The press also has the negative or “threat-based” leverage that arises from its ability to hurt the president politically<sup>357</sup> by including negative facts in news stories.

To live up to its democratic function and its own ethical standards, the press cannot offer favorable news coverage in exchange for access or presidential praise. But in the human relationships that develop in the Briefing Room, more subtle exchanges can help or hurt an administration. For example, a reporter may follow a trusted press secretary’s warning to hold off on a story<sup>358</sup> or check out a certain paragraph further.<sup>359</sup> Reporters can alert the press office about the stories they are working on,<sup>360</sup> and their questions can also inform the White House about what is stirring outside its walls.<sup>361</sup> News organizations also have a free hand in deciding whether to publish upbeat human interest stories about the White House and the first family. Political leaders are concerned about the way the press views them.<sup>362</sup> If the press can increase a president’s public approval, then the ultimatum game serves as a useful model of some press-president dynamics.<sup>363</sup>

In an ultimatum game, White House press reporters gain leverage if there is an increase in the value of stories they can report without depending on White House cooperation. For example, if reporters routinely got important information about the president through more reliable or convenient means, then the White House should have an incentive to offer more and higher quality information in order to continue to have a role in shaping stories. The leading reporters in the Briefing Room do have other sources,<sup>364</sup> and the White House knows it, so those reporters have more leverage to extract information. News media are always trying to strengthen their ability to gather information through unofficial avenues, hiring new investigative reporters and publicizing the secure Internet links where the public can send in anonymous tips.

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<sup>356</sup> Adler & Silverstein, *supra* note 57, at 19–20.

<sup>357</sup> *Id.*

<sup>358</sup> KUMAR, *supra* note 27, at 181 (quoting George W. Bush press secretary Roman Popadiuk as saying, “[Y]ou’re building trust, and you have something in the bank for the future. Many times I’ve had to tell a reporter, ‘Don’t do that,’ ‘Don’t print that,’ . . . and they say, ‘Okay, we’ll take care of you.’”).

<sup>359</sup> *Id.* at 212.

<sup>360</sup> *Id.* at 213.

<sup>361</sup> *Id.* at 182.

<sup>362</sup> Cook, *supra* note 51, at 162.

<sup>363</sup> Fogarty, *supra* note 5, at 1057–58.

<sup>364</sup> See, e.g., KUMAR, *supra* note 27, at 212.

The press position would also improve if deadlines magically relaxed.<sup>365</sup> In that case, a reporter's need for a specific piece of information would be less urgent, so the reporter would have time to get it from the White House or elsewhere. The White House would have less ability to follow the longtime strategy of downplaying information by releasing it after the evening broadcasts.<sup>366</sup> To relax deadline pressure, news organizations might require fewer daily reports from correspondents and more long-form stories or, more realistically, it could redefine the White House correspondent as part of an investigative team, routinely sharing information and bylines with reporters not in the Briefing Room. In such cases, the White House might, at times, feel more urgency than the reporter to publish a particular piece of information. In fact, this kind of teamwork does occur increasingly within news organizations, as demonstrated by a growing number of multiple bylines on stories about the administration.<sup>367</sup>

The press can benefit also from intermural teamwork. White House reporters work both in competition and cooperation. In the Briefing Room, all reporters hear the same information, and they all may use the White House responses to each other's questions. In terms of the ultimatum game, this reduces the cost of a piece of information to each reporter. The information is commonly known and so is less valuable in that way, but then reporters make less of an investment to get it.<sup>368</sup> If one reporter is cut off or if the question is skirted, others can follow up along the same lines. This strategy is one that some media observers called for early in the administration when the President first called CNN "fake news" and refused to take a question from its correspondent, Jim Acosta. What the next reporter should have said, according to one, was "Thank you, sir, but I yield my question to Mr. Acosta."<sup>369</sup>

Some reporters have tried this move. In March 2017, for example, Sean Spicer quoted several reports from the *New York Times*, holding them up as supporting the President's accusation that the Obama administration had spied on him during the presidential campaign. Correspondent Alexis Simendinger, of RealClearPolitics, got Spicer's attention and tried to redirect it to *Times* reporter Peter Baker:

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<sup>365</sup> This would require magic, indeed, given the heightened demands of the Internet era on reporters. E-mail from Mark Smith to Carol Pauli, *supra* note 40.

<sup>366</sup> KUMAR, *supra* note 27, at 252.

<sup>367</sup> E-mail from Mark Smith to Carol Pauli, *supra* note 40.

<sup>368</sup> See Fogarty, *supra* note 5, at 1064 (explaining the equilibrium formula for a politician covered by multiple journalists).

<sup>369</sup> Eric Zorn, *Without Solidarity, the Media Under Trump Will Be Lost*, CHI. TRIB. (Jan. 14, 2017), <http://www.chicagotribune.com/news/opinion/zorn/ct-trump-attacks-reporters-solidarity-perspec-0115-md-20170113-column.html>.

**Q** Sean, I'd like to ask you about two topics, but can you help us a little by calling on Peter right now?

**MR. SPICER:** No, I'm going to—

**Q** Call it—

**MR. SPICER:** I understand. I actually call the question. Alexis, if you don't want to answer the question I can call on somebody else.

**Q** Could you call on the New York Times, please?

**MR. SPICER:** No, thank you. Gabi.<sup>370</sup>

As Spicer went on to another reporter, Simendinger lost her chance to ask her questions. The abruptness of the moment got a short laugh from some in the Briefing Room. Yet, it has often happened that that one reporter picks up and repeats another's unanswered question.<sup>371</sup>

Reporters can increase their leverage by deciding, before a briefing, whether a particular question is crucial and then honing in on it together. Informally, this teamwork does occur—apparently spontaneously—at times, when the course of questioning achieves a shared focus. For example, on November 17, 2017, reporters seized on a *Washington Post* report about women who, as teenagers, had been sexually harassed by Roy Moore. He was the Republican candidate for the U.S. Senate from Alabama, whom the President had endorsed.<sup>372</sup> In the Briefing Room, one reporter asked whether allegations of sexual misconduct against the President should be investigated.<sup>373</sup> The next asked whether Moore should sue his accusers as the President had threatened to sue his accusers.<sup>374</sup> A third asked whether the

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<sup>370</sup> Press Briefing by Press Secretary Sean Spicer, WHITE HOUSE (Mar. 16, 2017, 3:04 PM), <https://www.whitehouse.gov/briefings-statements/press-briefing-press-secretary-sean-spicer-031617/>.

<sup>371</sup> E-mail from Mark Smith, former Associated Press White House Correspondent and former Pres. of the White House Correspondents' Ass'n, to Carol Pauli, Assoc. Prof. of Law, Texas A&M Univ. School of Law (Feb. 21, 2018, 1:35 PM) (on file with author) (saying, after covering the White House through seven administrations, “This actually has been a common practice among the so-called ‘mainstream’ media. If I had a nickel for every time one of the front-row big guys/gals said, ‘Hang on a second . . . I don’t think you answered Mark’s question . . .,’ I’d be a very wealthy man indeed.”).

<sup>372</sup> Philip Bump, *Timeline: The Accusations Against Roy Moore*, WASH. POST (Nov. 16, 2017), <https://www.washingtonpost.com/news/politics/wp/2017/11/16/timeline-the-accusations-against-roy-moore/>.

<sup>373</sup> *White House Daily Briefing*, C-SPAN (Nov. 17, 2017), <https://www.c-span.org/video/?437481-1/sarah-sanders-briefs-reporters-white-house&start=1151>.

<sup>374</sup> *Id.*

President was being hypocritical in his remarks opposing sexual misconduct.<sup>375</sup> A fourth asked whether the President believed the women in Alabama.<sup>376</sup> A fifth asked whether the President's accusers were to be believed.<sup>377</sup> Although a sixth reporter changed the subject, the seventh returned to it, asking whether sexual misconduct was a difficult conversation at the White House.<sup>378</sup> An eighth asked whether the President's past was an indication of his likely conduct in the future.<sup>379</sup>

Tag-team questions like these strengthen the reporters' position. Using it intentionally might require deciding which questions were most important and thinking about which ways to frame those questions would be most likely to succeed. If this technique were used often by the same group of reporters, the White House could respond by avoiding all of them. But reporters could time their efforts strategically and could change the lines of cooperation among themselves to keep White House from spotting the alliances and freezing them all out. Planning such endeavors would require some negotiation among reporters, perhaps requiring one to reveal enough information to persuade others that a specific question was worth a shared effort.

### C. *Beware of Traps*

Negotiation scholars warn against a variety of obstacles<sup>380</sup> and traps<sup>381</sup> that can lurk in difficult negotiations. At least two have arisen in the Briefing Room: the barrier of one's own emotional reaction and the trap of demonization.

#### 1. *ANGER*

In a contentious exchange, negotiators may find that the first barrier to success is within themselves.<sup>382</sup> Negotiators are advised to suspend their own emotions and not react when the other side is maddening.<sup>383</sup> Anger is especially predictable when an adversary appears to be determined to establish

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<sup>375</sup> *Id.*

<sup>376</sup> *Id.*

<sup>377</sup> *Id.*

<sup>378</sup> *Id.*

<sup>379</sup> *Id.*

<sup>380</sup> URY, *supra* note 169, at 8.

<sup>381</sup> MNOOKIN, *supra* note 354, at 18.

<sup>382</sup> URY, *supra* note 169, at 8.

<sup>383</sup> *Id.*

dominance rather than trust.<sup>384</sup> The negotiator must first question whether that perception is accurate or is a product of the negotiator’s anxieties.<sup>385</sup> Then, if the perception seems correct, the negotiator will still do best to refrain from immediate emotional reaction,<sup>386</sup> especially from striking back.<sup>387</sup>

This warning is especially fitting for the press. Journalism normally strives to take a neutral stance and to avoid having a stake in the outcome of any conflict.<sup>388</sup> But when the White House defines major news outlets as enemies, the press risks being drawn into a fight that can destabilize its footing and put its neutral stance at risk.<sup>389</sup> As Ury warns negotiators, “[t]hey are trying to bait you like a fish so that they can control you. When you react, you are hooked.”<sup>390</sup> The president’s then chief strategist, Steve Bannon, said as much to the established press when he warned that its anxieties were working against them, stating, “What we are witnessing now is the birth of a new political order, and the more frantic a handful of media elites become, the more powerful that new political order becomes itself.”<sup>391</sup>

There is power in making others react,<sup>392</sup> and some news organizations reacted to Donald Trump by stepping outside of their normal routines and taking a position. During the campaign, for example, the *New York Times* began calling certain of Trump’s statements “lies.”<sup>393</sup> The Huffington Post ended every item about Trump with an editor’s note calling him “a serial liar,

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<sup>384</sup> Adler & Silverstein, *supra* note 57, at 83.

<sup>385</sup> *Id.* at 83-84.

<sup>386</sup> *Id.*

<sup>387</sup> URY, *supra* note 169, at 33.

<sup>388</sup> E-mail from Mark Smith to Carol Pauli, *supra* note 40 (“Returning taunts and jeering is not a strategy. Nobody wins a shouting match with the president of the United States. Those of us who love truth and believe in daily journalism as the best route to it can only hope that patient, careful reporting will ultimately, over time, win out.”).

<sup>389</sup> URY, *supra* note 169, at 36 (“Often the other side is actually trying to make you react. The first casualty of an attack is your objectivity—the faculty you need most to negotiate effectively. They are trying to throw you off balance and prevent you from thinking straight.”).

<sup>390</sup> *Id.*

<sup>391</sup> Philip Rucker & Robert Costa, *Trump’s Hard-Line Actions Have an Intellectual Godfather: Jeff Sessions*, WASH. POST (Jan. 30, 2017), [https://www.washingtonpost.com/politics/trumps-hard-line-actions-have-an-intellectual-godfather-jeff-sessions/2017/01/30/ac393f66-e4d4-11e6-ba11-63c4b4fb5a63\\_story.html?utm\\_term=.47fc09908ce8](https://www.washingtonpost.com/politics/trumps-hard-line-actions-have-an-intellectual-godfather-jeff-sessions/2017/01/30/ac393f66-e4d4-11e6-ba11-63c4b4fb5a63_story.html?utm_term=.47fc09908ce8).

<sup>392</sup> *Id.* at 37.

<sup>393</sup> Liz Spayd, *Public Editor: When to Call a Lie a Lie*, N.Y. TIMES (Sept. 20, 2016), <https://www.nytimes.com/2016/09/20/public-editor/trump-birther-lie-liz-spayd-public-editor.html>.



rampant xenophobe, racist, misogynist and birther.”<sup>394</sup> After Trump’s first month in office, the *Washington Post* published a new slogan on its front page: “Democracy Dies in Darkness.”<sup>395</sup> It was generally seen as a reaction to the Trump White House, despite the newspaper’s explanation that the slogan had been months in the making.<sup>396</sup>

Rather than responding to anger with more anger,<sup>397</sup> negotiators are often able to break the cycle unilaterally by simply not reacting.<sup>398</sup> But when dealing with a powerful opponent, some response may be required.<sup>399</sup> One strategy would be for the press to take a small step to demonstrate that if both sides employ brute power, the results would be negative for both.<sup>400</sup> Such a move surfaced briefly in February 2016, after the White House booked vice president Mike Pence on all five of the Sunday public affairs newscasts—except for CNN.<sup>401</sup> CNN responded by rejecting the White House offer to substitute senior advisor Kellyanne Conway.<sup>402</sup>

The CNN move won praise from longtime journalist and former White House press secretary Bill Moyers, who understood from his sources that it was the start of an outright ban on Conway.<sup>403</sup> Moyers called that “one small step” toward reclaiming independence for the press.<sup>404</sup> Days later, when Conway did appear on CNN, Moyers lamented the reversal and worried again

<sup>394</sup> Hadas Gold, *The Huffington Post Ending Editor’s Note that Called Donald Trump ‘Racist’*, POLITICO (Nov. 9, 2017, 12:28 AM), <http://www.politico.com/blogs/on-media/2016/11/the-huffington-post-ending-its-editors-note-about-donald-trump-231044?> (The Huffington Post ended the practice in the hours after the election in order to start with a “clean slate.”).

<sup>395</sup> Paul Farhi, *The Washington Post’s New Slogan Turns Out to Be an Old Saying*, WASH. POST (Feb. 24, 2017), [https://www.washingtonpost.com/lifestyle/style/the-washington-posts-new-slogan-turns-out-to-be-an-old-saying/2017/02/23/cb199cda-fa02-11e6-be05-1a3817ac21a5\\_story.html](https://www.washingtonpost.com/lifestyle/style/the-washington-posts-new-slogan-turns-out-to-be-an-old-saying/2017/02/23/cb199cda-fa02-11e6-be05-1a3817ac21a5_story.html).

<sup>396</sup> *Id.*

<sup>397</sup> URY, *supra* note 169, at 34–35.

<sup>398</sup> *Id.* at 36–37.

<sup>399</sup> Adler & Silverstein, *supra* note 57, at 90.

<sup>400</sup> *Id.* at 83–84.

<sup>401</sup> Michael Calderone, *Mike Pence Skipping CNN on Sunday Show Circuit*, HUFFINGTON POST (Feb. 6, 2017, 5:40 PM), [http://www.huffingtonpost.com/entry/mike-pence-cnn-sunday-shows\\_us\\_5894bae8e4b09bd304bb14f0?mmaazwv2v52ricnmi](http://www.huffingtonpost.com/entry/mike-pence-cnn-sunday-shows_us_5894bae8e4b09bd304bb14f0?mmaazwv2v52ricnmi).

<sup>402</sup> Bill Moyers, *Trump’s Queen of Bull Hits a Bump in the Road*, MOYERS & CO. (Feb. 7, 2017), <http://billmoyers.com/story/trumps-queen-of-bull-hits-a-bump-in-the-road/>.

<sup>403</sup> Bill Moyers, *I Thought CNN Was Taking a Courageous Stand Against White House Lies. I Was Mistaken*, MOYERS & CO. (Feb. 8, 2017), <http://billmoyers.com/story/lamentation-bill-moyers/>.

<sup>404</sup> *Id.*

about her continued appearances on network talk shows, where he said “the format favors the fabricator.”<sup>405</sup>

Moyer’s concern about the CNN reversal may be assuaged by reconceiving the point of responding to an attack. Responding well may be viewed, not as punishing the other side, but as guiding it back to a workable negotiating relationship.<sup>406</sup> On this theory, the press should clearly frame a response as a defense to a specific provocation by the other side,<sup>407</sup> and it should avoid irrevocably slamming doors. For example, if a news organization bans a White House spokeswoman, decides to tag every story with the same editorial note, or goes ahead with a plan to adopt a dire warning as a new slogan on every future front page, it may actually lose negotiating power because the finality of such actions removes any incentive for the other side to change. If the White House has no way to avoid the pain of such press actions, then the press cannot use them to pressure the White House.<sup>408</sup> On the other hand, if a news organization selectively uses the word *lie* to identify and describe specific presidential statements, it may have more persuasive power.

## 2. DEMONS AND GHOSTS

The successful media strategy of Donald Trump did more than surprise the press. In the view of some analysts, it also threatened the value of accurate information, on which the press stakes its claim to legitimacy. President Trump also appeared to reject even the possibility of shame, which gives public opinion its power<sup>409</sup> to monitor government.<sup>410</sup> As NPR media correspondent David Folkenflik put it, “The press will have to consider how it can hold accountable someone who rarely if ever is willing to accept fault.”<sup>411</sup>

Editorials from campaign season through the inauguration debated whether and to what degree Donald Trump was a fascist,<sup>412</sup> a “demi-fascist,”<sup>413</sup>

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<sup>405</sup> *Id.*

<sup>406</sup> URY, *supra* note 169, at 144.

<sup>407</sup> Adler & Silverstein, *supra* note 57, at 92.

<sup>408</sup> FISHER, KOPELMAN & SCHNEIDER, *supra* note 315, at 66 (“Pain is not pressure unless there is a way to avoid the pain.”).

<sup>409</sup> Folkenflik, *supra* note 158.

<sup>410</sup> Baker, *supra* note 18, at 326.

<sup>411</sup> Folkenflik, *supra* note 158.

<sup>412</sup> See, e.g., Michael Kinsley, Opinion, *Donald Trump Is Actually a Fascist*, WASH. POST (Dec. 9, 2016), [https://www.washingtonpost.com/opinions/donald-trump-is-actually-a-fascist/2016/12/09/e193a2b6-bd77-11e6-94ac-3d324840106c\\_story.html](https://www.washingtonpost.com/opinions/donald-trump-is-actually-a-fascist/2016/12/09/e193a2b6-bd77-11e6-94ac-3d324840106c_story.html).

<sup>413</sup> Charles M. Blow, Opinion, *Trump: Madman of the Year*, N.Y. TIMES (Dec. 8, 2016), [https://www.nytimes.com/2016/12/08/opinion/trump-madman-of-the-year.html?\\_r=0](https://www.nytimes.com/2016/12/08/opinion/trump-madman-of-the-year.html?_r=0).

a narcissist,<sup>414</sup> a genuinely ill “madman,”<sup>415</sup> or a cunning “madman,” just acting irrationally for the strategic advantage<sup>416</sup> that might come from appearing not to care about consequences.<sup>417</sup> Two Harvard professors of government, in an editorial, worried that the success of the Trump campaign was a sign that norms of personal and partisan restraint had eroded so much as to endanger American democracy.<sup>418</sup> Should the press try to “negotiate” anything at all?

Negotiators sometimes face the question of whether to bargain with the devil<sup>419</sup> or with someone who is “crazy.”<sup>420</sup> To decide, they start by questioning assumptions. Skepticism is warranted. Experienced journalists warn reporters, “[b]eware of the fallacy of evil men.”<sup>421</sup> Experienced negotiators warn, “[w]hile ill will (on either side) is often a plausible explanation, stupidity or insanity is *rarely* what is causing a conflict.”<sup>422</sup> Demonizing the Trump administration runs the risk of closing off any search for ways that the White House and the press might better serve the public.<sup>423</sup> Assuming the worst about the White House also risks excusing the press from the self-examination that began on election night.<sup>424</sup>

Even if continued experience with the White House were to verify that the president is mad or worse, it is possible to respond by asking, “What is the alternative to negotiating?”<sup>425</sup> If continuing to take part in press briefings—or

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<sup>414</sup> Alan J. Lipman, Opinion, *The Narcissism of Donald Trump's Candidacy*, CNN (Oct. 28, 2016, 11:45 AM) <http://www.cnn.com/2016/10/28/opinions/trump-campaign-narcissism-lipman/index.html>.

<sup>415</sup> William Saletan, *Trump is a Madman*, SLATE (Oct. 20, 2016), [http://www.slate.com/articles/news\\_and\\_politics/politics/2016/10/donald\\_trump\\_and\\_the\\_paranoid\\_style\\_in\\_american\\_fascism.html](http://www.slate.com/articles/news_and_politics/politics/2016/10/donald_trump_and_the_paranoid_style_in_american_fascism.html).

<sup>416</sup> Evan Horowitz, *Trump the Madman* BOS. GLOBE (Dec. 20, 2016), <https://www.bostonglobe.com/news/nation/2016/12/20/donald-trump-and-madman-theory/V2a8etfjkTfzf1S4G7IbO/story.html>.

<sup>417</sup> Adler & Silverstein, *supra* note 57, at 96.

<sup>418</sup> Steven Levitsky & Daniel Ziblatt, Opinion, *Is Our Democracy in Danger?*, N.Y. TIMES (Dec. 16, 2016), <https://www.nytimes.com/2016/12/16/opinion/sunday/is-donald-trump-a-threat-to-democracy.html>.

<sup>419</sup> See generally MNOOKIN, *supra* note 354.

<sup>420</sup> FISHER, KOPELMAN & SCHNEIDER, *supra* note 315, at 64.

<sup>421</sup> KOVACH & ROSENSTIEL, *supra* note 335, at 136 (“[T]he likelihood that people did something because they are basically bad, or have vicious motives—because, in effect, they are evil—is almost always wrong.”).

<sup>422</sup> FISHER, KOPELMAN & SCHNEIDER, *supra* note 315, at 64 (emphasis in original).

<sup>423</sup> See URY, *supra* note 169, at 116.

<sup>424</sup> See FISHER, KOPELMAN & SCHNEIDER, *supra* note 315, at 64.

<sup>425</sup> ROGER FISHER, WILLIAM URY & BRUCE PATTON, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 163 (2d ed. 1991).

continuing to fight for fairer ground rules—might achieve an outcome that is better than walking out, then news organizations can make a decision. They can keep coming back, because it is rational to try,<sup>426</sup> or they can refuse as a matter of principle.<sup>427</sup>

Knowing when to stop is an important part of planning. While the first month of the Trump administration was prompting journalists to re-think their role at the White House, blogger Josh Marshall of Talking Points Memo suggested what amounted to a trip wire. He wrote, “America isn’t Russia. And I don’t think he can change us into Russia. So, unless and until we see publications shut down and journalists arrested or disappeared, let’s have a little more confidence in our values and our history and our country.”<sup>428</sup> That trip wire is too far.

A better place would be just below whatever goal the press chose as the least it could grudgingly accept. For example, it might draw the line at a full week of the White House answering only friendly questions from favorable reporters. Ideally, news organizations would not identify the line publicly, but—as it approached—they would signal the growing risk and remind the White House that it had a way out.<sup>429</sup> Then news organizations would begin to demonstrate their other options, symbolically at first.<sup>430</sup>

One symbolic gesture arose just fifteen days into the new administration. The managing editor for opinion at *U.S. News & World Report* urged the media to boycott the annual White House Correspondents Dinner as a way to “skip the pretense of conviviality.”<sup>431</sup> Such a gesture—if widely heeded—could warn the White House of more serious actions to come, for example, boycotting the press briefing. In this case, however, three weeks later, the President tweeted that he would not attend the dinner, himself.<sup>432</sup>

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<sup>426</sup> *Id.*

<sup>427</sup> MNOOKIN, *supra* note 354, at 36–46.

<sup>428</sup> Josh Marshall, *The Case for Not Being Crybabies*, TPM EDBLOG (Jan. 16, 2017, 11:08 AM), <http://talkingpointsmemo.com/edblogger/the-case-for-not-being-crybabies?>

<sup>429</sup> URY, *supra* note 169, at 148.

<sup>430</sup> *Id.* at 138.

<sup>431</sup> Robert Schlesinger, *Boycott the White House Correspondents Dinner*, U.S. NEWS & WORLD REPORT (Feb. 3, 2017, 1:05 PM), <http://www.usnews.com/opinion/articles/2017-02-03/in-the-age-of-donald-trump-boycott-the-white-house-correspondents-dinner>.

<sup>432</sup> Dean Obeidallah, *Why Trump Is Skipping the White House Correspondents’ Dinner*, CNN (Feb. 26, 2017), <http://www.cnn.com/2017/02/26/opinions/why-trump-bailed-on-whcd-obeidallah-opinion/index.html>.

### D. Develop a BATNA

“A good BATNA usually does not already exist; it needs to be developed.”<sup>433</sup> The press can think of its White House dispute on two levels. When trying to get accurate information for ongoing stories, the BATNA is simply to step up what the press does and should do already—look for information from other sources. In the negotiation over the rules of the game, however, the press can do more. In case the White House continues to attack, to bring in self-described “trolls,” and to avoid tough questions, the press can develop a better BATNA. Some suggestions follow.

#### 1. BE TRANSPARENT

The danger of presidential name-calling is not merely that it is rude or personally painful. A greater danger is that it works to delegitimize the press in the eyes of the public, furthering political polarization and distrust. While the reporting of the mainstream media has long informed high-level officials,<sup>434</sup> news organizations should do more to bolster their credibility in the eyes of the general public.

One easy step would be for a news organization to post its ethical standards in an obvious place on its home page. Most newsrooms have such standards, often developed over years of experience and written in great detail.<sup>435</sup> Among other things, they guide the use of unnamed sources, guard against conflicts of interest, and set the requirements for publishing corrections. Posting them would give audiences one more data point for evaluating news organizations and their information.

The Internet allows space for even more transparency. News organizations can link the facts in a story to source material, including complete transcripts of interviews; to information about quoted individuals; and to websites of organizations. Reporters can also provide a link to a paragraph on the decision to write a particular story, and they can add the questions that remain unanswered. Editors can clearly label stories to distinguish factual news reports from opinion pieces in ways that are obvious

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<sup>433</sup> URY, *supra* note 169, at 23.

<sup>434</sup> GRABER & DUNAWAY, *supra* note 35, at 176–77.

<sup>435</sup> See, e.g., *Standards and Ethics*, N.Y. TIMES, <https://www.nytc.com/who-we-are/culture/standards-and-ethics/> (last visited Apr. 4, 2018); *Washington Post Standards and Ethics*, AM. SOC’Y OF NEWS EDS., <http://asne.org/content.asp?pl=236&sl=19&contentid=335> (last visited Apr. 4, 2018); *SPJ Code of Ethics*, SOC’Y OF PROFESSIONAL JOURNALISTS, <https://www.spj.org/ethicscode.asp> (last visited Apr. 4, 2018).

even on a laptop or phone. These suggestions are among a number that have been proposed for the “next journalism”<sup>436</sup> of the Internet age. Attacks on the press have made them even more important.

## 2. BROADEN AUDIENCES

The mainstream press was justifiably criticized for its failure to read the American public accurately, and news organizations need to continue addressing that blind spot. To give meaning to their role as agents of the American public, newsrooms should work to reconnect with audiences they apparently forgot.<sup>437</sup> Newsrooms clustered on the coasts and reporters with academic degrees should explore ways to develop ongoing, interactive relationships with the full range of Americans, including working people in the heartland. Breaking out of media bubbles should include people in the media.<sup>438</sup>

Doing this may mean using “Skype seats” to connect big-city newsrooms to small-town newsrooms, meetings, or events. It may mean establishing new bureaus or finding new ways to exchange information with a broader cross-section of Americans. NPR, based in Washington, D.C., has begun collaborating with stations across the country to cover state governments and issues.<sup>439</sup> One broadcast chain has begun a series of television segments in which an audience member travels with a reporter to investigate a question together.<sup>440</sup> With the Trump phenomenon bringing increased revenues to major news organizations, some of that windfall should

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<sup>436</sup> KOVACH & ROSENSTIEL, *supra* note 335, at 182–83.

<sup>437</sup> See Jim Rutenberg & James Poniewozik, *Can the Media Recover from This Election?* N.Y. TIMES (Nov. 8, 2016), <https://www.nytimes.com/2016/11/09/arts/television/after-this-election-can-the-media-recover.html?action=click&contentCollection=Media&module=RelatedCoverage&region=EndOfArticle&pgtype=article>.

<sup>438</sup> Joe Pompeo, Peter Sterne, Hadas Gold & Alex Weprin, *What Went Wrong? Eleven Takes from Media Veterans*, POLITICO (Nov. 10, 2016, 10:27 AM), <http://www.politico.com/blogs/on-media/2016/11/what-the-media-missed-editors-executives-and-journalists-weigh-in-231167>.

<sup>439</sup> Joseph Lichterman, *A New Collaboration: NPR Stations Nationwide Are Working Together to Spot Trends in State Governments*, NIEMANLAB (Jan. 19, 2017, 10:56 AM), <http://www.niemanlab.org/2017/01/a-new-collaboration-npr-stations-nationwide-are-working-together-to-spot-trends-in-state-governments/>.

<sup>440</sup> Tamar Wilner, *A TV Station Taps Viewers to Help ‘Truth Test’ the News*, COLUM. JOURNALISM REV. (Nov. 25, 2016), [http://www.cjr.org/business\\_of\\_news/tv\\_fake\\_news\\_fact\\_check.php](http://www.cjr.org/business_of_news/tv_fake_news_fact_check.php).

go toward innovations that support the endangered republican vision of civil society.

### 3. WELCOME LEGITIMATE NEWCOMERS

To support democratic pluralism, the work of gathering information, formulating viewpoints, and checking government power should be supported and expanded among small partisan groups. The addition of “Skype seats” in the Briefing Room for news organizations outside of Washington may be a positive move that deserves the continued support of the more established members of the White House press corps. Indeed, Fogarty’s ultimatum analysis predicts that the press will gain more information as more members of the press are added in a long-running game. His observation had one warning, however. The important factor is not the number but the quality of reporters.<sup>441</sup>

Political boosters are not reporters. The White House can grant them press credentials nonetheless, and a reader of the press briefing transcript posted on the White House website will not be able to spot them. The White House Correspondents’ Association (WHCA) can take steps to shed light on any non-reporters in the Briefing Room. It can use its website to post the transcript of each briefing and add the information that is missing from the official version: the news affiliation of each reporter. The WHCA could help readers identify which news organizations try to verify information, as opposed to relaying rumors, by posting the credentialing of each reporter. Some reporters have credentials only from the White House. Others have also been credentialed to cover Congress, which requires being found to be “bona fide correspondents of repute”<sup>442</sup> by the Standing Committee of Correspondents.<sup>443</sup> The WHCA took a step in clarifying this difference last year when it amended its by-laws regarding membership categories. Now, in order to vote or hold office in the WHCA, members must have Congressional press credentials.<sup>444</sup>

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<sup>441</sup> Fogarty, *supra* note 5, at 1065.

<sup>442</sup> *Membership*, U.S. SENATE PRESS GALLERY, [https://www.dailypress.senate.gov/?page\\_id=8908](https://www.dailypress.senate.gov/?page_id=8908) (last visited Sept. 17, 2018).

<sup>443</sup> See, e.g., Hadas Gold, *Capitol Hill Correspondents Committee Declines to Credential Breitbart*, POLITICO (Apr. 25, 2017, 11:37 AM), <http://www.politico.com/blogs/on-media/2017/04/25/capitol-hill-correspondents-committee-breitbart-237577>. (the Standing Committee has declined to issue credentials to Breitbart).

<sup>444</sup> Compare Article III,(2), of *By-Laws of the White House Correspondents’ Association*, WHITE HOUSE CORRESPONDENTS’ ASS’N (July 17, 2017),

4. *RETHINK THE BRIEFING*

The briefing has come under fire before. During the later years of the Obama administration, one critic said it amounted to nothing more than the White House avoiding questions and the press preening.<sup>445</sup> A unified press boycott or termination of press briefings might do what these critics aimed at, but the loss of this forum for holding the president accountable would be a loss, indeed.<sup>446</sup> For critical news organizations to abandon the Briefing Room would likely increase the credibility of the flattering ones. A better strategy is the one proposed by Professor Rosen soon after the January 21, 2017 scolding by the White House press secretary. Professor Rosen wrote, “[The White House] has no power over the press but what they give to him.”<sup>447</sup> He advised sending interns to the Briefing Room and freeing the experienced reporters for other work. “Recognize that the real story is elsewhere and most likely hidden.”<sup>448</sup>

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<http://www.whca.net/whcabylaws.htm> (“To qualify for regular membership, an applicant must be employed on the editorial staff of a newspaper, periodical, wire service, radio, TV, or other newsgathering organization that regularly reports on the White House. The applicant or the newsgathering organization with which the applicant is affiliated must be credentialed by a Congressional Standing Committee.”), and *By-Laws of the White House Correspondents’ Association*, WHITE HOUSE CORRESPONDENTS’ ASS’N (June 15, 2017), <https://web.archive.org/web/20170615205244/http://www.whca.net/whcabylaws.htm> (by-laws as archived the prior month). See also Tom Kludt, *White House Correspondents Association Considers Rule Change that Could Ice out Breitbart*, CNN MEDIA (July 10, 2017, 8:17 PM), <http://money.cnn.com/2017/07/10/media/white-house-correspondents-association-breitbart-news/index.html>.

<sup>445</sup> Reid Cherlin, *End the White House Press Briefing! It’s an Unholy Charade*, NEW REPUBLIC (July 22, 2013), <https://newrepublic.com/article/113949/end-white-house-press-briefing>.

<sup>446</sup> E-mail from Mark Smith to Carol Pauli, *supra* note 40 (“Most reporters I knew on the White House beat . . . from Mother Jones to Fox News . . . do their best to play things straight and not grind a political ax. I certainly did so, always . . . And truly I see merit in both sides’ views . . . [A]s much as we might hate daily briefings where obfuscation is the order of the day . . . they remain the best way to hold our top elected leader to account. If our current president resents them or thinks those asking questions are the ‘enemy of the American people,’ that’s deeply disturbing. And must be fought.”) Reporters who do the work do not see it as a charade. *Id.*

<sup>447</sup> Rosen, *supra* note 231.

<sup>448</sup> *Id.*



## V. CONCLUSION

The arrival of the Trump administration disrupted the tacit bargain that had long defined the White House relationship with the press. In the Briefing Room, hostilities were open. Reporters watched, amazed, as the administration scolded them and insisted on facts that were verifiably false. Some journalists feared that they were watching a presidential attempt to undermine the existence of facts and upset the shared reality that makes democracy possible. Reporters argued among themselves whether to change or hold fast to core values.

This article has applied negotiation theory to offer four steps for the press to take. The press should articulate and prioritize its own goals, from expansive hopes to grudging minimum requirements. It should take account of the interests of the White House and the president's longstanding personal desire for good publicity. It should be skeptical of "madman" and tyrant theories of the president's conduct to avoid being drawn into a fight. Finally, it should make moves that will improve its BATNA—its ability to meet its own goals without the White House—and should determine in advance where to set the trip wire that would cause it to exercise its other options.

During the first year of the Trump administration, the media have made some of these moves and also others. The White House Correspondents' Association has grown more active in coordinating a united response to the White House, asking network bureau chiefs whether they want the WHCA to weigh in on a tweeted presidential threat.<sup>449</sup> The WHCA has found a wider range of allies, too, in Congress and in journalism organizations.<sup>450</sup> When the White House repeatedly held briefings with no sound or camera allowed,<sup>451</sup> Connecticut Representative Jim Himes introduced a bill that would require a President to host at least two media conferences each week.<sup>452</sup>

Allies now include several international organizations, which are focusing new attention on the question of press freedom in the United States.<sup>453</sup>

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<sup>449</sup> Indira Lakshmanan, *How to Cover Trump Without Getting Sucked into His War on the Media*, POYNTER (Jan. 5, 2018), <https://www.poynter.org/news/how-cover-trump-without-getting-sucked-his-war-media>.

<sup>450</sup> *Id.*

<sup>451</sup> Julia Glum, *Trump vs. the Media: Proposed Law Would Make White House Do Press Interviews on Camera*, NEWSWEEK (July 17, 2017, 1:11 PM), <http://www.newsweek.com/white-house-press-briefings-camera-himes-637768>.

<sup>452</sup> H.R. 3228, 115th Cong. (1st Sess. 2017).

<sup>453</sup> Lakshmanan, *supra* note 449. See also *First Amendment Under Increasing Attack*, REPORTERS WITHOUT BORDERS, <https://rsf.org/en/united-states> (last visited Apr. 4, 2018).

## “ENEMY OF THE PEOPLE”

In anticipation of the “fake news” awards, the Committee to Protect Journalists, a nonprofit organization promoting world press freedom, named its own global “Press Oppressors.”<sup>454</sup> President Trump was named for “Overall Achievement in Undermining Global Press Freedom,” the organization saying that his policies had emboldened repressive regimes overseas.<sup>455</sup> Trump was also named runner-up in the “Most Thin-Skinned” category, second to President Recep Tayyip Erdoğan of Turkey.<sup>456</sup>

Press briefings are not likely to become more civil soon. A dispute becomes “ripe” for resolution only when it is a sufficiently “painful and costly predicament.”<sup>457</sup> Initially, at least, the drama in the Briefing Room has appeared to benefit both sides. White House supporters circulated claims that the press puts out “fake news,” while opponents rallied to the established news organizations. The *New York Times* reported 41,000 new paid subscriptions in the week after the election,<sup>458</sup> not to mention stronger morale. *Times* executive editor Dean Baquet said in a CNN interview that the new administration had been “tremendous” for journalism because “[the newspaper’s mission is now] clearer than it’s ever been.”<sup>459</sup>

While a conflict continues, it stirs energy and interest.<sup>460</sup> That has been true here: the change in the White House has brought heightened attention to the work of journalism and reflections on improving the way news is done. Some suggest new methods of fact-checking.<sup>461</sup> Others warn of the possibility of press capture by an executive,<sup>462</sup> or they forecast an increasingly

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(naming both President Obama and President Trump as having reduced news organizations’ access to information and their ability to report).

<sup>454</sup> *CPJ Recognizes Global Press Oppressors Amid Trump’s Fake News Awards*, COMMITTEE TO PROTECT JOURNALISTS (Jan. 8, 2018, 5:01 PM), <https://cpj.org/2018/01/cpj-recognizes-global-press-oppressors-amid-trumps.php>.

<sup>455</sup> *Id.*

<sup>456</sup> *Id.*

<sup>457</sup> William Zartman, *Timing and Ripeness*, in *THE NEGOTIATOR’S FIELDBOOK: THE DESK REFERENCE FOR THE EXPERIENCED NEGOTIATOR* 17, 17 (Andrea Kupfer Schneider & Christopher Honeyman, eds., 2006).

<sup>458</sup> Grynbaum & Ember, *supra* note 135.

<sup>459</sup> Jill Disis, *New York Times Editor: Trump Tweets ‘Wildly’ Boost Subscriptions*, CNN MEDIA (Feb. 26, 2017, 12:48 PM), <http://money.cnn.com/2017/02/26/media/new-york-times-editor-dean-baquet-subscriptions/index.html>.

<sup>460</sup> See FISHER, KOPELMAN & SCHNEIDER, *supra* note 315, at 143.

<sup>461</sup> Alexios Mantzarlis, *Is It Time to Completely Rethink Fact-Checking?*, POYNTER (Mar. 31, 2017), <http://www.poynter.org/2017/is-it-time-to-completely-rethink-fact-checking/453003/>.

<sup>462</sup> Emily Bell, *Donald Trump is a Media Organization*, COLUM. JOURNALISM REV. (Jan. 10, 2017), [http://www.cjr.org/tow\\_center/donald\\_trump\\_media\\_organization.php](http://www.cjr.org/tow_center/donald_trump_media_organization.php).

treacherous worldwide web.<sup>463</sup> As negotiations in the Briefing Room continue, the press can press—not for harmony—but for a healthy tension that produces real information for the American people, whose interests are at stake.

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<sup>463</sup> Lee Rainie, Janna Anderson & Jonathan Albright, *The Future of Free Speech, Trolls, Anonymity and Fake News Online*, PEW RESEARCH CENTER (Mar. 29, 2017), <http://www.pewinternet.org/2017/03/29/the-future-of-free-speech-trolls-anonymity-and-fake-news-online/>.